SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 9

CULLEN FUEL COMPANY, INC., OWNER OF DECK SCOW "CULLEN No. 32," PETITIONER,

vs.

W. E. HEDGER, INC., BAILEE OF CARGO

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Petition of the CULLEN FUEL CO., INC., as owner of the Deck Scow "Cullen No. 32," for Exoneration or Limitation of Liability

STATEMENT

Mar. 20, 1928.—Filed Petition.

Mar. 21, 1928.—Filed Order Restraining Suits of Long Island Company, et al.—Thacher, J.

Apr. 19, 1928.—Filed Answer of Long Island Railroad Company.

July 13, 1928.—Filed Answer of W. E. Hedger & Company, Inc.

Nov. 13, 1930.—Before Woolsey, J., trial began, tried with A91-392, 97-186 and 93-381. Adjourned to Nov. 14, 1930.

Nov. 14, 1930.—Before Woolsey, J., trial resumed. Adjourned to Nov. 17, 1930.

Nov. 17, 1930.—Before Woolsey, J., trial resumed. Adjourned to Nov. 18, 1930.

Nov. 18, 1930.—Before Woolsey, J., trial resumed. Cases argued and submitted.

Nov. 24, 1930.—Filed Opinion #6158—Woolsey, J. (See Opinion.)

Jan. 5, 1931.—Filed Order, that the opinion stand as to Findings of Fact and Conclusions of Law, etc.—Woolsey, J.

Jan. 21, 1931.—Filed Interlocutory Decree with Reference to Horace M. Gray—Woolsey, J.

Feb. 11, 1931.—Filed Notice of Appeal and Order—Woolsey, J.

Feb. 11, 1931.—Filed Assignments of Error.

[fol. 2] IN UNITED STATES DISTRICT COURT

PETITION OF CULLEN FUEL CO., INC.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The Petition of Cullen Fuel Co., Inc., as Owner of Deckscow "Cullen No. 32," her tackle, apparel, etc., for exoneration or limitation of liability in a cause of damage, civil and maritime, alleges as follows:

First. That at all the times hereinafter mentioned the petitioner, Cullen Fuel Co., Inc., was and still is a corporation organized and existing under and by virtue of the Laws of the State of New York, and at all of the times hereinafter mentioned was the owner of the deckscow "Cullen No. 32" and maintains its principal office and place of business in the Borough of Manhattan, City of New York.

Second. That the said deckscow "Cullen No. 32" is now within the Harbor of New York, within this District and the jurisdiction of this Honorable Court.

Third. That up to the time of the disaster hereinafter described the deckscow "Cullen No. 32" was tight, staunch, strong and in all respects seaworthy.

Fourth. That on August 11, 1925, the said deckscow "Cullen No. 32" was chartered through its agent, Cullen Transportation Co., Inc., to W. E. Hedger Co., Inc., a corporation organized and existing under and by virtue of the Laws of the State of New Jersey under an oral charter amounting to a demise, pursuant to which the said W. E. [fol. 3] Hedger Co., Inc., agreed to pay charter hire at a certain rate per day for an indefinite period of time and to return the said deckscow to said petitioner or its agent, Cullen Transportation Co., Inc., in the same good condition as when received, ordinary wear and tear excepted.

Fifth. That delivery of the said deckscow to the said W. E. Hedger Co., Inc., was made on August 11, 1925, pursuant to the terms of the aforesaid charter and the said deckscow was in the complete care, custody and control of the said W. E. Hedger Co., Inc., at the time of the disaster

hereinafter described and was thereafter returned to said petitioner in a damaged condition, which was not the result of ordinary wear and tear.

Sixth. Upon information and belief, that after the delivery of the said deckscow to W. E. Hedger Co., Inc., on August 11, 1925, as aforesaid, and while the said deckscow was in the complete care, custody and control of the said W. E. Hedger Co., Inc., and on or about August 13, 1925, she was taken alongside the S/S "Berk" which lay at the pier at the foot of Roosevelt Street, East River, and was placed outside of a derrick lighter which lay alongside the S/S "Berk." While lying at this place the "Cullen No. 32" was loaded with a cargo of ore by the said W. E. Hedger Co., Inc., its servants and/or agents and/or persons employed by it. That after the said scow was so loaded and while still in the custody and control of the W. E. Hedger Co., Inc., she was caused to dump part of her cargo, to turn over and to come into contact with the Long Island Railroad "Float No. 10," and to strike the end of Pier 22.

[fol. 4] Seventh. That the aforesaid disaster and any and all losses, damages and injuries resulting therefrom were occasioned without the privity or knowledge of the petitioner herein and were not occasioned or contributed to by any fault or negligence on the part of this petitioner, nor through the unseaworthiness of the deckscow "Cullen No. 32," nor on the part of any person for whom petitioner was or is responsible, but were sustained through the fault, negligence and lack of care of the W. E. Hedger Co., Inc., in whose possession, custody and control the said deckscow was at the time of the occurrence hereinabove described, in the following among other particulars:

1. In that the said W. E. Hedger Co., Inc., its servants, agents and/or agents failed to load said deckscow in a careful manner;

2. In failing to have the cargo on said deckscow properly stowed and trimmed;

3. In that they stowed and trimmed the cargo of said deckscow improperly;

4. In that they overloaded the said deckscow;

5. In that they failed to place the said deckscow in a proper and safe position after it was loaded;

or the said damage was caused by some other person or persons for whom this petitioner is in no way responsible.

Eighth. Nevertheless, an action at law has been commenced in the Supreme Court, New York County, by the [fol. 5] Long Island Railroad Co. against your petitioner, as owner of said deckscow, claiming damages in the sum of $3,000.00. It is alleged in the complaint in said suit that the plaintiff therein is the owner of Pier 22, East River, New York; that on August 13, 1925, your petitioner's deckscow "Cullen No. 32" because of her unseaworthy condition and the negligence of her owner in not having the scow properly manned and her cargo properly stowed and trimmed, listed and capsized, dumping her cargo and that as she dumped her cargo she jumped across the slip and struck Pier 22 with great force, causing extensive damages to the pier, all without fault or negligence on the part of said plaintiff. The attorneys for the plaintiff in said suit are Messrs. Burlingham, Veeder, Masten & Fearey, No. 27 William Street, Borough of Manhattan, City of New York.

Ninth. That an action in admiralty has been commenced in the United States District Court for the Southern District of New York by the Long Island Railroad Co. against your petitioner, as owner of the deckscow "Cullen No. 32", claiming damages in the sum of $5,000.00. It is alleged in the libel in said suit that the libellant therein is the owner of carfloat "Long Island Railroad No. 10"; that on August 13, 1925, the said carfloat was lying moored on the up river side of Pier 22, East River, and that on said day the deckscow "Cullen No. 32" listed and capsized, dumping her cargo, and that as she dumped her cargo the said scow jumped across the slip and struck Pier 22 and the carfloat "Long Island Railroad No. 10" with great force, causing extensive damages to the pier and carfloat and that said [fol. 6] damages were due to the unseaworthiness of the deckscow "Cullen No. 32" and the fault and negligence of your petitioner in that it permitted the deckscow "Cullen No. 32" to be loaded with cargo while in an unseaworthy condition; in failing to have a competent person on the said scow; in failing to have the said scow seasonably pumped

out and properly stowed and trimmed. The attorneys for the libellant in said suit are Messrs. Burlingham, Veeder, Masten & Fearey, No. 27 William Street, Borough of Manhattan, City of New York.

Tenth. That an action in admiralty has been commenced in the United States District Court for the Southern District of New York by W. E. Hedger Co., Inc., as bailee of a cargo of barytes ore laden on board the deck scow "Cullen No. 32" against said deckscow claiming damages in the sum of $5,000.00. It is alleged in the libel in said suit that on August 13, 1925, the deckscow "Cullen No. 32" having on board the libellant's cargo of barytes ore which had been loaded on said deckscow by another respondent, Port Fueling Corporation, due to her unseaworthy condition and/or to the fact that she was not properly loaded, listed and capsized, dumping all her cargo into the river, and that said dumping and capsizing were due to fault on the part of the deckscow "Cullen No. 32" and those in charge of her, your petitioner, and the Fort Fueling Corporation. The attorneys for the libellant in said suit are Messrs. Single & Single, No. 15 William Street, Borough of Manhattan, City of New York.

Eleventh. That the value of the said deckscow "Cullen No. 32" after the disaster before mentioned was $250.00 [fol. 7] and that there was no pending freight on the said deckscow. That the interest of your petitioner in the said deckscow "Cullen No. 32" and her freight pending at the time of the disaster was $250.00.

Twelfth. That your petitioner herein claims exoneration from liability for any and all losses, damages and injuries resulting from the aforesaid accident and in the alternative claims the benefit of limitation of liability provided in Sections 4283, 4284 and 4285 of the Revised Statutes of the United States and the various Statutes amendatory thereof and supplemental thereto, and your petitioner is ready and willing to give a stipulation with sureties for payment into court of the amount of the value of its interest in the said deckscow "Cullen No. 32" and her pending freight in their condition immediately after the accident aforesaid, whenever same shall be ordered, as provided by the aforesaid statutes, and by the general rules in admiralty and by the rules and practice of this court.

Thirteen. Except as above set forth that there are no demands, unsatisfied liens, or claims of liens or any suits pending thereon (except such as have been properly secured by bond and stipulation) against the deckscow "Cullen No. 32" or its appurtenances, as far as your petitioner knows.

Fourteenth. All and singular the premises are true.

Wherefore your petitioner prays that this court will cause due appraisement to be made of the amount of the [fol. 8] value of its interest in the deckscow "Cullen No. 32", and her pending freight, as of the time of the accident aforesaid, in pursuance of the Statutes of the United States aforesaid, and will make an order for the giving of a stipulation with sureties for the payment thereof into court, whenever the same shall be ordered by the court, and will cause a monition to be issued to all persons claiming damages for any and all loss, damage or injury caused by or resulting from the accident aforesaid, citing them to appear before a Commissioner to be named by this court and to make due proof of their respective claims, at or before a certain time fixed by the writ, and also to appear and answer the allegations of this petition, according to the law and practice of this court; and that the court on the filing of such stipulation as may be deemed to be proper, or on the payment into court of the appraised value of the petitioner's interest in the said deckscow "Cullen No. 32" and her pending freight will issue its injunction restraining the prosecution of the aforesaid suits and actions set forth against the petitioner, and the commencement and prosecution thereafter of any suit or action or legal proceedings of any nature or description whatever, against the petitioner herein, except in the present proceeding, in respect to any claim or claims arising out of the aforesaid accident.

Your petitioner further prays that the court will adjudge that the petitioner is not liable to any interest in loss, damage or injury arising from the aforesaid accident, or, in the alternative, that if the petitioner be held liable therefor, its liability may be limited to the amount of the value of its interest in the said deckscow "Cullen No. 32" and her pend- [fols. 9 & 10] ing freight, and that the money paid or ordered to be paid as aforesaid be divided pro rata among such claimants as have duly proved their claims before a Commissioner to be appointed herein, saving to all parties

any priority to which they may be entitled, and that your petitioner have such other and further relief as to the court may seem just.

Macklin, Brown, Lenahan & Speer, Proctors for Petitioner, Office and P. O. Address: 44 Beaver Street, Borough of Manhattan, City of New York.

Duly sworn to by R. H. Samhaus. Jurat omitted in printing.

[fol. 11] IN UNITED STATES DISTRICT COURT

[Title omitted]

RESTRAINING ORDER—March 20, 1928

An order having been entered herein on the 20th day of March, 1928, providing that the further prosecution or institution and prosecution of any and all suits, actions or legal proceedings of any nature or description whatsoever, against the Deck Scow "Cullen No. 32," her engines, boilers, etc., or against the petitioner herein or against any other person or persons interested in the said vesel in respect of any claim arising out of or connected with the matters set forth in the petition herein should be restrained and an ad interim stipulation for value in the sum of $250.00 with interest from August 11th, 1925, with sufficient [fol. 12] security undertaking to pay into court within ten days after the entry of an order confirming the report of a commissioner to be appointed to appraise the amount of the value of the interest of the petitioner in the said Deck Scow "Cullen No. 32" and her pending freight, if any, as of August 11th, 1925, the amount or value of such interest as thus ascertained or to file in this proceeding a bond or stipulation for value in the usual manner with surety in the said amount and that pending the payment into court of the amount or value of the interest of petitioner in said Deck Scow "Cullen No. 32" and her pending freight so ascertained, if any, or the giving of a stipulation for value therefor, the said bond shall stand as security for all claims in said limitation proceedings having been duly filed with the Clerk of this Court on the 20th day of March, 1928.

Now, on motion of Macklin, Brown, Lenahan & Speer, proctors for the petitioner, it is

Ordered that further prosecution of the suit by Long Island Railroad Company v. Cullen Fuel Co., Inc., in the Supreme Court of the State of New York for the County of New York.

Long Island Railroad Company, as owner of the "Long Island Railroad No. 10" v. Cullen Fuel Co., Inc., in the United States District Court for the Southern District of New York.

W. E. Hedger Co., Inc., as bailee against Scow "Cullen No. 32" and Cullen Fuel Co., Inc., and Fort Fueling Corporation, U. S. Dist. Court, Southern District, and the institution and prosecution of any and all suits, actions or legal proceedings of any nature or description whatsoever ex-
[fols. 13-17] cepting the present proceeding against the petitioner or any person or persons interested in the said Deck Scow "Cullen No. 32" or against the said Deck Scow "Cullen No. 32," her tackle, apparel, etc., in respect of any claim arising out of or consequent to or connected with the alleged happening which occurred on or about August 11th, 1925, be and the same hereby are stayed and restrained until the hearing and determination of this proceeding; and it is further

Ordered that the service of this order as a restraining order be made within this district by delivering a copy thereof to the person or persons to be restrained or to their respective proctors or attorneys or any other district by the United States Marshal for such district delivering a copy of this order to the person or persons to be restrained or to their respective attorneys or proctors in case action, suit or other legal proceedings have been taken.

T. D. Thatcher, U. S. D. J.

[fol. 18] IN UNITED STATES DISTRICT COURT

ANSWER OF W. E. HEDGER CO., INC.

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The answer of W. E. Hedger Co., Inc., as bailee of a cargo of barytes ore, lately laden on board the deck scow "Cullen No. 32" to the petition of the Cullen Fuel Company, Inc., as owner of said deck scow "No. 32," her tackle, apparel, etc.,

for exoneration or limitation of liability, in a cause of damage, civil and maritime, alleges on information and belief, and respectfully shows to this Honorable Court as follows:

[fol. 19] First. As to the allegations in the "First" article of said petition, it denies that it has any knowledge or information thereof sufficient to form a belief.

Second. As to the allegations in the "Second" article of said petition, it denies that it has any knowledge or information thereof sufficient to form a belief.

Third. It denies each and every allegation in the "Third" article of said petition.

Fourth. It denies each and every allegation in the "Fourth," "Fifth" and "Sixth" articles of said libel in so far as the same is inconsistent with the allegation contained in the libel of this respondent, W. E. Hedger Co., Inc., against the scow "Cullen No. 32," heretofore filed in this court and except in so far as herein admitted or modified in the "Thirteenth" and "Fourteenth" articles of this answer.

Fifth. It denies each and every allegation in the "Seventh" article of said petition.

Sixth. It admits that an action at law has been commenced in the Supreme Court, New York County, by Long Island Railroad Company against the petitioner, claiming damages in the sum of three thousand ($3,000) dollars, and denies each and every allegation in the "Eighth" article of said libel, excepting in so far as the same is confirmed by the complaint in said action, copy of which is in the hands of this petitioner, and is hereby referred to for greater certainty.

[fol. 20] Seventh. It admits that an action has been commenced in the United States District Court for the Southern District of New York in admiralty by the Long Island Railroad Company against the petitioner as owner of the deck scow "Cullen No. 32" claiming damage in the sum of Five thousand ($5,000) dollars, and denies each and every other allegation in the "Ninth" article of said petition, excepting in so far as the same is confirmed by the papers and documents in said action now on file in the office of the clerk of this court.

Eighth. It admits that an action has been begun in admiralty in the United States District Court for the Southern District of New York, by this respondent, W. E. Hedger Co., Inc., as bailee of a cargo of barytes ore laden on board the deck scow "Cullen No. 32" against the deck scow "Cullen No. 32," claiming damages in the sum of Five thousand ($5,000) Dollars, and it denies each and every other allegation in the "Tenth" article of said petition, excepting in so far as the same is confirmed by the papers and documents in said action now on file in the office of the clerk of this court.

Ninth. As to the allegations in the "Eleventh" article of said libel, after the disaster in said petition mentioned, the value of the said deck scow "Cullen No. 32" and the interest of the petitioner herein and her freight pending was only Two hundred and fifty ($250) Dollars, it denies that it has any knowledge or information thereof sufficient to form a belief.

Tenth. As to the allegations in the "Twelfth" article of said petition it denies that it has any knowledge or infor-
[fol. 21] mation thereof sufficient to form a belief.

Eleventh. As to the allegations in the "Thirteenth" article of said petition, it denies that it has any knowledge or information thereof sufficient to form a belief.

Twelfth. It denies each and every allegation in the "Fourteenth" article of said petition.

Further answering said petition, this respondent alleges that the true facts and circumstancess attempted to be set forth in said petition are as follows:

Thirteenth. At the time of the occurrences hereinabove in said petition mentioned, the said deck scow "Cullen No. 32" was owned and managed and operated by the petitioner Cullen Transportation Co., Inc. On or about the 13th day of August, 1925, the said deck scow "Cullen No. 2" having on board the libellant's cargo of barytes ore which had been loaded on the said deck scow by the Port Fueling Corporation from the steamship "Berk," was lying alongside the said steamship "Berk" at the foot of Roosevelt Street, East River. At about one P. M. when approximately four hundred (400) tons of ore had been loaded on

board the said deck scow "Cullen No. 32" the said scow "Cullen No. 32," due to her unseaworthy condition, and the fact that she was not properly loaded, listed and capsized, dumping all the cargo that was on her into the river.

Fourteenth. The aforesaid capsizing and resulting loss [fol. 22] of libellant's cargo was not caused through any fault, neglect or want of care on the part of the libellant or those for whom libellant is responsible, but was caused through the fault, neglect and want of care on the part of the Scow "Cullen No. 32," and those in charge of her operation and control, and the Cullen Transportation Co., Inc., and the Port Fueling Corporation, its agents, servants and employees in the following, among other particulars:

As to the Scow "Cullen No. 32" and the respondent Cullen Transportation Co., Inc.:

1. In that the said scow "Cullen No. 32" was old and unseaworthy;

2. In that those in charge of the said scow were careless, incompetent and inattentive to their duties;

3. In that the master of the said scow failed to keep her properly pumped out;

4. In that the said scow was not in charge of a competent person;

and in other respects which will be pointed out at the trial of this action.

As to the respondent, Port Fueling Corporation:

1. In that its agents, servants and employees in charge of the loading of the cargo on board the scow "Cullen No. 32" were careless, incompetent and inattentive to their duties;

2. In failing to properly load and trim the cargo on the scow "Cullen No. 32,"

[fol. 23] and in other respects which will be pointed out at the trial of this action.

Fifteenth. That by reason of the foregoing the libellant has been damaged in the total loss of its cargo, survey fees, etc., in approximately the sum of Five thousand Dollars ($5,000), no part of which has been paid.

Sixteenth. All and singular the premises are true.

Wherefore this respondent prays that the petition herein be dismissed with costs.

Single & Single, Proctors for Respondent, W. E. Hedger Co., Inc., Office & P. O. address: 15 William Street, Borough of Manhattan, New York City.

[fol. 24] *Duly sworn to by S. W. Pierce. Jurat omitted in printing.*

[fol. 25] IN UNITED STATES DISTRICT COURT

INTERROGATORIES PROPOUNDED BY RESPONDENT TO BE ANSWERED BY LIBELLANT UNDER OATH

First interrogatory: What is the age of the Scow "Cullen No. 32"?

Second interrogatory: If the scow "Cullen No. 32" was not built for you, state (a) where she was built; (b) when you purchased the said scow "Cullen No. 32"; (c) from whom the scow "Cullen No. 32" was purchased; (d) her age at the time you purchased her?

Third interrogatory: When were repairs last made to the scow "Cullen No. 32"?

Fourth interrogatory: (a) Annex an itemized copy of the bill for repairs made to the said scow; (b) if the repairs above referred to were made in accordance with the survey, annex a copy of the survey.

Fifth interrogatory: (a) When was the scow "Cullen No. 32" last in dry dock? (b) What repairs were made to her at that time? (c) If the repairs referred to herein were made in accordance with a survey, annex a copy of the survey; (d) Annex a copy of the bill for repairs rendered at the time of the dry docking referred to herein.

Sixth interrogatory: When was the scow "Cullen No. 32" last overhauled? (b) Annex a copy of the bill for the said overhauling.

Seventh interrogatory: What damages were sustained by the scow "Cullen No. 32" in the year prior to August 13, 1925?

[fol. 26] Eighth interrogatory: Were these damages repaired?

Ninth interrogtory: (a) Annex a copy of the bill for the repairing of the damages referred to in the preceding interrogatory. (b) If the repairs were made in accordance with a survey, enclose a copy of the survey.

Tenth interrogatory: What cargoes had the scow "Cullen No. 32" been carrying in the year prior to August 11, 1925?

Eleventh interrogatory: What are the dimensions of the scow "Cullen No. 32"?

Twelfth interrogatory: What is the carrying capacity of the scow "Cullen No. 32"?

Thirteenth interrogatory: What is the largest load the scow "Cullen No. 32" has ever carried?

[fol. 27] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER TO INTERROGATORIES

Libellant answers the interrogatories propounded to it by respondent, William E. Hedger Company, Inc., as follows:

Answer to first interrogatory: Libellant does not know when the scow "Cullen No. 32" was built but is informed that it was built in 1912.

Answer to second interrogatory: (a) Libellant does not know. (b) Libellant does not know. (c) Libellant does not know. (d) Libellant does not know.

Answer to third interrogatory: Libellant does most of the repair work on its fleet of boats and at least once a year puts each of its boats in dry dock for necessary caulk-
[fol. 28] ing and repairs. Libellant has no record of when repairs were last made to the "Cullen No. 32" or who made them.

Answer to fourth interrogatory: Answered in answer to Third Interrogatory.

Answer to fifth interrogatory: Answered in answer to Third Interrogatory.

Answer to sixth interrogatory: Answered in answer to Third Interrogatory.

Answer to seventh interrogatory: Libellant does not know.

Answer to eighth interrogatory: All repairs of damages to the "Cullen No. 32" were promptly made.

Answer to ninth interrogatory: Libellant does not know where the repairs were made.

Answer to tenth interrogatory: The "Cullen No. 32" had been carrying all kinds of bulk deck cargoes.

Answer to eleventh interrogatory: Length—112 feet. Beam—33 ft. Depth—12 feet.

Answer to twelfth interrogatory: About 600 tons.

Answer to thirteenth interrogatory: Libellant does not know.

Macklin, Brown, Lenahan & Speer, Proctors for Libellant. Office & P. O. address: 44 Beaver Street, Borough of Manhattan, City of New York.

[fols. 29-54] STATE OF NEW YORK,
County of New York, ss:

J. Dudley Eggleston, being duly sworn deposes and says that he is a member of the firm of Macklin, Brown, Lenahan & Speer, proctors for the libellant in this action; that he has read the foregoing answers to interrogatories and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. That the reason this verification is made by deponent and not by libellant is that the libellant is a corporation, no officer of which is within this district and the jurisdiction of this Honorable Court; that the sources of deponent's knowledge and the grounds of his belief as to the matters and things therein stated to be alleged on information and belief are had from correspondence, documents, etc., in his possession.

Sworn to before me this 12th day of November, 1930.
——, Notary Public, No. —, —— County.

[fol. 55] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Admiralty 98/138

In the Matter of the Petition of the CULLEN TRANSPORTATION COMPANY as Owner of the Cullen Deck Scow "Cullen No. 32"

Admiralty 91/392

LONG ISLAND RAILROAD COMPANY

against

CULLEN TRANSPORTATION COMPANY

Admiralty 93/381

CULLEN TRANSPORTATION COMPANY, as Owner of the Deck Scow "Cullen No. 32,"

against

WILLIAM E. HEDGER & COMPANY, INC., PORT FUELING CORPORATION

Admiralty 97/186

WILLIAM E. HEDGER & COMPANY, INC., as Bailee,

against

The Scow "CULLEN 32," CULLEN TRANSPORTATION COMPANY, INC., and PORT FUELING CORPORATION

Case

Before Hon. John M. Woolsey, U. S. District Judge

New York, November 13, 1930—2:30 P. M.

APPEARANCES

Messrs. Macklin, Brown, Lenahan & Speer, by J. D. Eggleston, Esq., of counsel, for Cullen Transportation Company.

Messrs. Burlingham, Veeder, Fearey, Clark & Hupper, by P. F. Shortridge, Esq., of counsel, for the Long Island Railroad Company.

Messrs. Single & Single, by T. H. Middleton, Esq., of counsel, for Hedger Transportation Co., Inc., demise charterer of scow.

Messrs. Foley & Martin, by J. A. Martin, Esq., of counsel, for Port Fueling Corporation, stevedores engaged in unloading scow.

[fol. 56] The claims of the petition and answers are stated.

Ownership and incorporation of the parties are admitted.

It is stipulated that the testimony be used in all the four suits, and that Hedger, as demise charterer, was bailee.

TESTIMONY FOR THE PETITIONER

ERNEST D. SWEET, being duly sworn and examined as a witness for the petitioner, testifies:

Direct examination.

By Mr. Eggleston:

Q. Mr. Sweet, what is your occupation?

A. Superintendent of the marine department.

Q. Of what company?

A. Cullen Transportation.

Q. And how long have you been connected with that company?

A. Since 1917.

Q. How long have you been superintendent of the marine department?

A. Since 1924.

Q. Did the Cullen Transportation Company own the deck scow No. 32 in August, 1925?

A. It did.

Q. How long had that company owned the scow, to your knowledge?

A. Oh, I don't know; I know they owned her in 1918, but prior to that I don't know.

Q. On August 11, 1925, did you charter the Cullen No. 32 to the W. E. Hedger Company?

A. I did.

Q. What kind of a charter was that?

A. The ordinary oral charter, over the telephone.

Q. Used in the harbor?

A. Yes, sir.

[fol. 57] Q. Taken over the telephone?

A. Yes, sir.

Q. Subsequent to the charter of the boat was the boat delivered to the Hedger Company—did the boat go under charter to the Hedger Company?

A. Prior to August 11th?

Q. No——

A. The same day, yes.

Q. Where was the boat when she went under charter?

A. The south side of East 29th Street.

Q. Did you see the boat yourself before she went under the charter?

A. Yes.

Q. And when was that with respect to the time that she went under charter?

A. In the morning of August 11th.

Q. The same day?

A. Yes.

By the Court:

Q. Was she light then?

A. Yes, sir.

Q. Describe her?

A. Oh, she is 112 feet long, 33 feet wide and 12 feet sides.

Q. Flat bottom?

A. Yes, sir, a deck scow.

Q. That is, she was covered over—when you say a deck scow—had she hatches?

A. No, the cargo is all loaded on the deck; there is no house on her.

Q. So that beneath the deck, inside of b r hull was——

A. A space, she doesn't carry no cargo there.

Q. And she doesn't have any ballast or anything?

A. No, she has no ballast.

Q. She is only a floating box?

A. Yes.

Q. You couldn't see inside of her when you saw her?
A. Yes, I went down in her.
Q. You went down in her on the morning of August 11th?
A. Yes, sir.
Q. Well, what about it?
A. I beg pardon?
Q. Tell me about her inside?
A. Well, she is what they call a partition boat, see; [fol. 58] she has two partitions run diagonally through her, fore and aft.
Q. You don't mean diagonal?
A. Fore and aft, rather.
Q. Does that divide the space below in her into three parts?
A. Into three parts.
Q. All right, go on. Did you go into the partitions?
A. I went into the two outside ones.
Q. And what was their condition?
A. All right.
Q. What about her arrangements for pumping?
A. She has two 3-inch Edison hand pumps, one on each end.
Q. You didn't go into the center?
A. I went through the center after going through the two sides.
Q. So that you say before she went under charter on August 11th you had gone through each of these three divisions of the inside of the scow?
A. Yes, sir.
Q. How did you get down to them?
A. In a hatch; in the bow there is a hatch on each end of it; you go down through.
Q. And what was the condition of them?
A. All right.

By Mr. Eggleston:

Q. Did you examine the outside of the scow?
A. You mean outside——
Q. You say you went down through the scow; did you look her over on the outside?
A. Yes, sir.

By the Court:

Q. How much water did she draw when she was light, like that?

A. Well, I couldn't say as to that just exactly how much she would draw.

[fol. 59] Q. You must have some idea, 12 foot sides——

A. About 25 inches, I should say, or 20 inches, something like that.

Q. Well, call it 2 feet?

A. Yes.

Q. That is fair, isn't it?

A. Yes, sir.

Q. All right, go on.

By Mr Eggleston:

Q. You said you looked over the outside; what was the condition of that?

A. All right.

Q. When you examined the inside of the boat was there any water in her?

A. No, there was no water to speak of.

Q. Was she leaking?

A. No.

Q. What was the general condition of the boat?

A. Good.

Q. Who was the captain of the Cullen No. 32 when she went under charter?

A. Emanuel Santos.

Q. How long had he worked for the Cullen Transportation Company?

A. About four years.

Q. As captain of No. 32 and other scows?

A. Yes.

Q. How did you find his work during that time as a scow captain?

A. All right.

The Court: How long had he worked there?

The Witness: About four years.

The Court: He doesn't live on this scow, of course?

The Witness: Yes, he does.

Mr. Eggleston: They have a small cabin on the after end of the scow and the scow captain lives aboard.

[fol. 60] Q. What equipment did the scow have?

A. We have seven lines on there, all the regular general equipment of the scow, two 5-inch lines and two 4½-inch lines, two 7-inch lines and a running line about 3¼.

Q. What was the condition of the equipment?

A. All right.

Q. Did this scow have the equipment customarily and generally found on boats of that kind?

A. She did.

By the Court:

Q. What sort of place did she have to fasten the ropes to, and where were they?

A. She had three bitts on the side and two center bitts forward.

Q. Were those close together?

A. Yes.

Q. Did the three bitts on the side divide the side into three parts?

A. Into three parts; they were about equal, see.

Q. And how about the center bitts forward; were they about in the center?

A. They are about in the center with the bitts in between, towing bitts.

Q. That is the opposite end from the house, is it?

A. Yes, it is on what we call the bow.

By Mr. Eggleston:

Q. Did you see the scow captain before the scow went in charter to Hedger?

A. Yes.

Q. Did you give him any orders?

A. Only that he was going under charter, and to stay on his boat; I didn't know what time the tug would be after him.

Q. Did you give him any further order?

A. No.

[fol. 61] Q. Do you give the orders of the Cullen Transportation Company to the captains of the boats that they operate?

A. Yes.

Q. What orders, if any, had you given to the No. 32 prior to her going under charter?

A. Well, nothing any more than to stay on his boat, and if there was anything the matter, any damage, or if his boat was leaking, or if he was short of lines or anything of the kind, report it to me; that is all I told him.

Q. Do the orders to the captains of the Cullen boats originate with you?

A. Yes, sir.

Q. Do you give them any orders with respect to the loading of the cargo?

A. No.

Cross-examined by Mr. Middleton:

Q. Mr. Sweet, are these fore and aft partitions on the No. 32 supposed to be watertight?

A. Well, now, I couldn't say positively whether they are or not.

Q. Well, I didn't ask you whether they were or not; I ask you if they were supposed to be?

A. I don't know.

Q. Is the purpose of them to prevent too much water entering the boat, if the boat should start or just to give structural strength?

A. No, they are just to give the boat structural strength.

Q. Have your boats rakes at each end?

A. Yes.

Q. What is the angle of the rake at the——

A. I can't say.

Q. Is it an angle of 45 degrees?

A. I can't tell.

By the Court:

Q. You must have some idea, you have been there so long, is it perpendicular like that or is it like that (indicating)?

[fol. 62] A. It is like that (indicating about 45 degrees).

Q. Now, when you examined this boat on the south side of 29th Street, was it dark down in the hold?

A. Yes.

Q. Did you have a light?

A. I had a flashlight.

Q. Electric flashlight?

A. Yes.

Q. And you took it and flashed it and looked all around?

A. Yes, sir.

Q. Tell us just exactly what you did when you made this examination?

A. Well, I was down in there and I looked at her deck beams to see if they were——

Q. That is the beams, the upper beams on the deck?

A. Yes; and I looked at her sides to see if there were any leaks in her sides or if she had any planks broken.

The Court: Did you find any?

The Witness: No, sir.

The Court: When you walk around on the bottom, I suppose they are always a little damp?

The Witness: Yes, there is always a little dampness there, but there was no leaks there.

Q. How much water was there?

A. I am not prepared to say; they always have a little water, any wooden boat carries a little bilge water in there.

Q. Well, she had a little water in there?

A. Yes, she had a little bilge water in there.

Q. Now, Mr. Sweet, can you tell us how long No. 32 had been on the south side of 29th Street before she was delivered to Roosevelt Street?

A. Not positively, but not a great while.

[fol. 63] Q. Well, how long do you think?

A. Well, I am not prepared to say positively.

Q. You don't know at all?

A. No.

Q. But the whole time she was lying there she was light, was she?

A. Yes.

Redirect examination:

By Mr. Eggleston:

Q. What had the Cullen No. 32 been doing just before she went under charter to Hedger?

A. Carrying general cargo, bricks, ashes, lumber.

Q. Had she been operating continuously carrying cargo?

A. Yes.

Cross-examined by Mr. Shortridge:

Q. Do you know, Mr. Sweet, definitely, what particular cargo she was carrying immediately before this?

A. No, I am not prepared to say that.

Q. Do you know whether the cargoes were light or heavy?

A. The only thing I can tell you is that she was in general cargo.

Q. Do you know whether her cargoes were light or heavy?

A. No, not just prior to her going in that charter.

Q. Do you know whether she was fully loaded at any of these periods immediately before this?

A. No.

Cross-examined by Mr. Martin:

Q. On the deck of this boat there are bulkheads, aren't there?

A. Not on the deck, under the deck.

Q. I am not talking about the bulkheads that support the deck, at each end of the deck there are cargo bulkheads, aren't there.

A. Yes, sir.

[fol. 64] Q. And how high are they?

A. They go about 10 feet.

Q. And that is for the cargo to be piled in behind those bulkheads——

A. (No answer.)

The Court: Do you mean there are high bulkheads at each end?

The Witness: Yes, sir.

Q. And that is to have the cargo piled in——

A. That is to keep the cargo from sliding over from her bow and stern deck.

Q. How far is the forward bulkhead from the bow?

A. From the bow it is about 10 feet if I remember rightly.

Q. And what do you say the after one is——

A. About the same.

Q. The stern cargo bulkhead is about immediately forward of the cabin, isn't it?

A. Yes.

Q. And about what distance from the extreme stern of the boat, not from the cabin?

A. Well, I should say from 10 to 12 feet.

Q. She is what is known as a 700 or 800 ton boat, then, isn't she?

A. I don't know what her carrying capacity is.

Q. You are the superintendent for Cullen and have been since 1918 and you don't know that?

A. I said I was the marine superintendent from 1924.

Q. All right; when did you become superintendent?

A. 1924.

Q. What month?

A. I don't know just exactly what month it was.

Q. How long have you been around scows?

A. Well, I have been around them since 1918.

Q. What was your connection with them in 1918?

A. I was assistant to Mr. Sammis at that time.

[fol. 65] Q. Wasn't your duty to see the scows?

A. No, I worked in the office.

Q. And you were an office man up till 1924?

A. Yes.

Q. How long have you been with Cullen?

A. Since 1917.

Q. And you knew this deck scow from 1917? then?

A. Yes.

Q. How long before that——

A. I knew we had such a deck scow.

Q. How long did you know her before 1917?

A. I didn't know anything about her before 1917.

Q. On each side between the bulkheads there are coamings, aren't there?

A. You are talking about the bulkheads that are on deck?

Q. Between the cargo bulkheads on deck and the after bulkheads there are coamings?

A. Yes.

Q. Running fore and aft?

A. Yes.

Q. They are right on the edge of the vessel, aren't they?

A. Yes.

Q. They are right over the edge of the side of the vessel?

A. Yes.

Q. How high are they?

A. 22 inches.

Q. Now, between these coamings and the bulkhead is the cargo space?

A. Yes.

Q. The coamings are likewise to keep the material from running overboard, is that right?

A. That's right.

Q. Was there a captain on board when you examined her?

A. Yes.

Q. Do you know how long he had been on that boat?

A. How long—do you mean the full time he had been on that boat?

Q. Yes.

A. No, I can't exactly say whether it was one or two years that he had been on her.

[fol. 66] Q. Well, to your knowledge had he been on her in 1924?

A. Yes, he had been on in 1924.

Q. You always found him a good man?

A. Yes.

Q. Why did you have to go down and examine this boat both inside and outside if you got no report from your captain of anything wrong?

A. Because I made it a practice on boats I chartered out.

Q. Don't you rely on your captian?

A. To a certain extent.

Q. Now, I suppose—what time did this boat go out in the morning?

A, Morning? She was taken out sometime during the night.

Q. The night of what?

A. The 11th.

Q. Do you know what tug took her?

A. No.

Q. How many boats did you examine that day?

A. Oh, I couldn't answer that.

Q. A great number?

A. No, I wouldn't say—I simply couldn't answer.

Q. How long did it take you to go through it, ten minutes?

A. No, it takes longer than that; it takes three quarters or perhaps an hour.

Q. Now, these pumps you spoke of; there is one fore and aft?

A. Yes.

Q. They are each outside of the cargo bulkhead, aren't they?

A. Yes.

Q. On the extreme corner of the boat?
A. Yes.
Q. One on the starboard side?
A. Yes.
Q. And one on the port side?
A. Yes.
Q. The starboard side pump, is that forward or aft?
A. That is aft.
Q. And the forward pump——
A. Is on the port side, the port corner.

The Court: What are they run by?
The Witness: Hand.

[fol. 67] Q. That is, the captain has to pump?
A. Yes.
Q. Have you any report or do you know the existence of any report, having been an office man up there, of what this boat was doing for the six month prior?
A. No.
Q. There would be such a report in your office, wouldn't there?
A. I daresay there would be.
Q. Well, you know there would be, don't you?
A. Yes.
Q. Have you any record of when this boat was last into any drydock?
A. We make a practice of putting——
Q. I didn't ask you that?
A. Do you mean the positive month or day?
Q. Yes.
A. No, I don't.
Q. There is such a report in existence, is there?
A. I don't know.
Q. You were office man for about seven years and you know that there is a record of when boats go in for repairs?
A. Yes.
Q. And that record is in Cullen's office?
A. Well, we have moved twice since 1925.
Q. But the record was kept during that period?
A. I suppose so.
Q. Have you looked up that record to see when the repairs were made?
A. No.

Q. Where did you make them?

A. Some at Jersey City Drydock and some at Hunts Point Drydock, all bottom work at the drydocks and all top work we did ourselves.

Q. Where was your yard for doing it?

A. 29th Street and East River.

Q. Are you still with Cullen?

A. Yes.

Q. You know where these records are kept, of what service the boats are in, as an office man?

[fol. 68] A. No, I don't know where they are kept, but around the office; only I say we moved twice since 1925.

Q. You don't know of any records being destroyed, do you?

A. I don't know of any being destroyed but I don't know of their being kept.

Q. Now, this coaming you said was about 2 feet?

A. 22 inches.

Q. Is that solid or is it a rail with opening underneath?

A. There are scuppers through the bottom of it.

Q. And otherwise it is a solid rail?

A. Yes.

Q. You don't know of your own knowledge, or you haven't found out how old this boat was?

A. No.

Q. Cullen's business was also a great deal in the coal trade?

A, Yes.

Q. He used this boat quite often for carrying coal?

A. If he had occasion to use it.

Q. That is a deck scow?

A. Yes.

Q. Not a coal boat?

A. Yes.

Q. Now, when you examined this boat she had a draft of anywhere from 20 to 24 inches, you think?

A. Yes.

Q. That would leave about 10 or 11 feet out of the water.

A. Yes.

Redirect examination,

By Mr. Eggleston:

Q. Mr. Sweet, I understood you to say that Cullen's did the top work on their boats. What do you mean by top work?

A. We do all the caulking, all the woodwork that is above the water line, that is, the light water mark. All the bottom work and everything that requires a docking we have to send to a drydock.

[fol. 69] Q. How much of a staff does Cullen maintain to do that work?

A. We have four men there.

Q. And where is that work done?

A. At the foot of East 29th Street.

Q. And where was your office at the time you examined her?

A. At 30th Street.

Q. And the boat was at East 29th Street?

A. Yes, the east side of East 29th Street.

The Court. She was at your own place then?

The Witness: Yes.

Q. Were you asked by me to look up the records to find out when repairs were last made to this boat and when she was last drydocked?

A. Yes.

Q. Did you make an effort to locate the records?

A. Yes.

Q. What did you find?

A. I told you I couldn't find any.

Q. You couldn't find records of the time she was last repaired and going under charter?

A. No.

Q. Do you know what work was done on her before she went under charter?

A. Everything that was necessary——

Motion to strike it out.

The Court: I sustain it.

It is stricken out.

Q. Do you know when she was in drydock prior to going under charter, do you know the date?

A. Now, I do not know the date; the only thing I can tell you about that is that I know it was less than a year.

[fol. 70] By Mr. Martin:

Q. Where did it go to drydock?

A. Jersey City Drydock, I imagine, at that time.

Q. This is your impression; we don't want to get what your impression is. You said she went to the Jersey City Drydock a year before this?

A. I said within a year.

Q. Well, how long before this accident would you estimate it; eight months, ten months, eleven—five months, or what?

A. Well, I couldn't answer positively; I should think about eight months.

Q. And what drydock did you say she went to?

A. The Jersey City Drydock.

Q. Within eight months?

A. Yes.

Q. Did you ask the Jersey City Drydock to furnish you with any record of when she was there?

A. No.

Q. You knew you could obtain that, didn't you?

A. Yes, if I had asked for it.

Q. When I asked you a little while ago about records you said you didn't know if they were in existence or not. Now you just told counsel you looked for them. You didn't tell me that?

A. No, I didn't know whether they were in existence or not.

The Court: Did you have the boat under repairs down at the Jersey City Drydock?

The Witness: No, sir, at Hunts Point Drydock.

The Court: Well, you can find out from there when it was done. You had better get some information on that to show that she was repaired.

[fol. 71] Q. Now, I understand you have no records after searching for them of what repairs your company did above the water line, is that correct?

A. As far as I know.

Q. And you have made a search through the office for them?

A. Yes.

Q. And all of the upper part of the boat was repaired by your own yard?

A. Yes.

By the Court:

Q. You went in there and she was light and drawing 2 feet of water?

A. Yes.

Q. And you saw no leaks?

A. Yes.

Q. You couldn't see the existence of any leaks above that two feet?

A. No, but still——

Q. You looked at it with your flashlight but you don't actually know whether if she had had pressure of cargo on her and been down 6 feet or something like that, leaks would have been coming from any direction?

A. When they come in we search them out.

Q. That is your ordinary practice for the period while she was lying at your home place there; you probably looked through her and saw whether any caulking was necessary——

A. Yes.

Q. You can't say that you did it but you say that is your custom?

A. Yes.

Q. How deep have you seen her loaded; what freeboard would she have with a load that would be safe?

A. I never saw her loaded.

Q. Well, is there anybody connected with your office who knows how deep they load those things?

A. Well, I don't know; you see when we charter those boats out, when we simply charter the boats out——

[fol. 72] Q. When you charter the boats you charter them out——

A. They put a safe cargo on her.

Q. Well, do you mean to say that you never have seen one of these boats with what you regard as a full load on? I just want to get how deep they go?

A. I am not prepared to say that for I never measured them.

Q. I am not asking you for a measurement; you are not an instrument of precision, but you look at one in the water an- you——

A. Well, about 15 inches.

The Court: I will say, "sometimes we load these deck scows and submerge them so their freeboard is only 15 inches" you say.

The Witness: 15 or 18 inches.

By Mr. Eggleston:

Q. Mr. Sweet, when you examined the outside of this boat before she went under charter did you look at the caulking?

A. Well, to a certain extent, yes.

Q. What was the condition of the caulking?

A. Very good; I simply told our caulker to go over and if there were any — or anything of that kind to caulk her up.

By the Court:

Q. Was this before or after the charter?

A. Before.

Q. How soon before?

A. It may have been a couple of days; when he used to come in there I would send him down.

[fol. 73] Q. When the boats came back from charter you would have one of your own men look her over and see what happened to her in the meantime?

A. Yes.

By Mr. Eggleston:

Q. And what was the condition of the caulking when you examined her?

A. All right.

By Mr. Martin:

Q. Were you up on the deck of the boat when you looked at the sides?

A. Yes.

Q. And one side was up against the dock or the pier?

A. Yes.

Q. And the other side was up against another boat?

A. No.

Q. And all you could do was to look down on one side and from there you said the caulking was good?

A. That is as far as I could see.

By Mr. Middleton:

Q. Mr. Sweet, when you speak of the water line you mean the light water line?

A. Yes, sir.

Q. You made all repairs above the light water line?

A. Yes.

Q. So that the Cullen Company wouldn't have any record of repairs made below the light water line?

A. No.

[fol. 74] EMANUEL SANTOS, being duly sworn and examined as a witness for the petitioner, testified:

Direct examination.

By Mr. Eggleston:

Q. Were you captain of the Cullen No. 32 in August, 1925?

A. Yes.

Q. Do you remember this scow being loaded with ore and turning over?

A. I do.

Q. At Roosevelt Street?

A. Yes, sir.

Q. You were captain of her at that time?

A. I was the captain.

Q. How long had you been captain of deck scows prior to that?

A. Well, I was on her about a year.

Q. And had you been on other deck scows?

A. Yes, I was on other boats for the same company.

Q. And how long were you with the Cullen Company as Captain of deck scows?

A. Well, I judge it was about four years.

Q. Do you work for the Cullen Company now?

A. I am not working for them now.

Q. What is your present occupation?

A. Mechanic's helper.

Q. Whom do you work for now?

A. I work for the Arbuckle Sugar Refining Company.

Q. And when did you leave the employ of the Cullen Company?

A. Well, I didn't leave—the same year.
Q. The same year?
A. Yes, sir.

The Court: Right after the accident?
The Witness: Yes.
The Court: What happened to you?
The Witness: I went to a coal boat two or three months.

[fol. 75] Q. After the accident, for one of Cullen's coal boats?
A. Yes, and worked for two or three months.
Q. You were captain of one of Cullen's coal boats for several months after this accident?
A. Yes, sir.
Q. Did you get in the river after the accident occurred?
A. No, sir, for I jumped out.

By the Court:

Q. Jumped out where?
A. I jumped out and another fellow from the same company hollered to me; I was in the cabin doing some painting and when she was going over he hollered to me and I jumped.
Q. Where did you jump to?
A. To the deck. I called to the engineer to take some cargo off and protect her so she wouldn't sink but he wasn't there, he had gone ashore for his lunch. And I went ashore myself and phoned to the company and told them the boat was pretty near sinking.
Q. How long did it take her to sink?
A. When I came back she was pretty near sinking and I had only time to cut the line on the bow and said to the other fellow to cut the line on the stern.
Q. How long did it take her to go over?
A. She would take at least twenty minutes.

By Mr. Eggleston:

Q. Where did your boat start out from when she went up to Roosevelt Street to get the load of copper?
A. She started from 29th Street East River.

Q. And how long had you been lying at 29th Street East River?

A. I never laid there long, but two or three days.

[fol. 76] Q. And before you went to 29th Street what was your boat doing?

A. I was towing general cargo, brick.

Q. Did you say you carried brick?

A. Yes, sir.

Q. What was the cargo you carried just before you went to 29th Street?

A. I had just come in with a load of brick.

Q. And how much of a load of brick did you have?

A. Very deep; I don't remember exactly but I know the boat was very deep in the water.

The Court: How near the water would the deck of the boat come?

The Witness: 3½ feet.

Q. And you say you carried other cargo?

A. Yes.

Q. How deep had your boat been loaded on those occasions?

A. All the ways deep.

Q. Full loads?

A. Yes, sir. I had carired brick for two or three months.

By the Court:

Q. Carrying it all the time?

A. Yes.

Q. And what months were they?

A. Well, I wouldn't remember now.

Q. Were they many months before this charter, before August 11th?

A. That was, I guess about—it isn't so many days for as a soon as I came in to 29th Street I had orders to send me out.

Q. Was it bricks you were carrying just before that?

A. Just before that.

By Mr. Eggleston:

Q. And how deep had your boat been loaded when you were carrying bricks before that?

A. Oh, 3 feet and a half.

[fol. 77] Q. From the top?

A. From the water, the head.

The Court: You mean the deck was very close to the water; it would be a foot above the water, the deck itself, if the rail was 3 feet?

The Witness: The deck was a foot and a half above the water.

Q. That is the way you had been loaded?

A. Yes, sir.

Q. When you loaded this ore how deep did they have your boat loaded?

A. Well, she was pretty deep——

Motion to strike it out.

It is stricken out.

The Court: State how deep; was it one foot or two feet, or what?

The Witness: She was about two and a half.

The Court: Just about the same as it was with the brick?

The Witness: Yes, for the cargo was a little heavy.

Q. When she loaded this ore your boat was loaded about the same depth as she had been loaded with brick, was she——.

A. Yes, sir.

By the Court:

Q. Had you almost completed your loading when the accident occurred?

A. Yes, for I knew the load was too heavy and I knew she wasn't complete; they started to load on one side more [fol. 78] so I had to tell the engineer about it and he didn't pay any attention, he said it was all right and the next day then when they finished loading it was about forenoon, it was 11:30, and I told him he had better send a man to straighten my boat up for it was listing too much.

Q. Was it listing away from the hoister?

A. She was alongside the derrick.

Q. If this is the derrick, was your boat slanting away from the derrick or towards the derrick?

A. Just close to the derrick.

Q. But you said—there is the derrick and you said your boat was tipped——

A. Yes, sir.

Q. Now, which way was she tipped?

A. She was tipped that way.

Q. Away from the derrick?

A. Away from the derrick, for when the water came in she——

Q. Now, here is your scow and here is the derrick; now how was your scow; you show me yourself the way your scow was leaning at 11:30 when you saw her there?

A. My scow was leaning that way (indicating away from the derrick).

By Mr. Eggleston:

Q. Now, Captain, what time of day was it that you went from 29th Street up to Roosevelt Street?

A. It was sometime in the night but I don't remember.

Q. And where were you placed when you got up to Roosevelt Street?

A. They put me alongside the derrick.

Q. Alongside of the ship you took ore from?

A. Yes, sir.

Q. Did they do any loading the night you got there?

A. Not until the next morning.

[fol. 79] Q. When did they commence loading your scow?

A. The next morning.

Q. The morning after you got there they started loading?

A. Yes.

Q. What time was it they started?

A. Well, I told you I can't remember whether it was seven or eight o'clock.

The Court: It was when they started work in the morning?

The Witness: Yes, sir.

Q. How were you lying there when they commenced to load you; were you against the slip or was there something between you?

A. I was alongside of the derrick.

Q. And the derrick was alongside of the ship?
A. The ship.
Q. And you were up in the slip?
A. My bow to the ship's stern.
Q. And the ship was in the slip *how* in?
A. Yes.
Q. How long did they load you the first day?
A. Well, the first day they started to load it astern there deep and then they moved to the bow and they loaded it there deep, 9 or 10 feet, and I moved back and put a little pile underneath it, and she had a list on one side.
Q. Which side was she listed on?
A. The bow.
Q. Was it away from the derrick or towards the derrick?
A. Away from the derrick.
Q. What time did they knock off work the first day?
A. Oh, about five o'clock, I think.
Q. At noon?
A. At noon.
Q. Did they work in the afternoon?
A. They quit about five.
[fol. 80] Q. They quit then at five in the afternoon?
A. Yes, sir.

The Court: Did you have a list that afternoon away from the derrick?
The Witness: Yes, I had the first day.

Q. Did you stay on the boat that night?
A. Sure.
Q. Slept on the boat?
A. Slept on the boat.
Q. Before you went to bed that night or at any time, did you look at the boat to see if she had any water in her?
A. Yes, I looked to see if she had any water.
Q. When was that?
A. Before I went to bed.
Q. When your boat went up there to take on this load of ore what condition was she in?
A. O. K.
Q. Did she leak much?
A. No- much.

Q. How often would you have to pump?

A. Once a week.

Q. And how long?

A. About eighteen minutes; she never leaked much when I was there.

Q. Did she leak any more than the ordinary wooden deck scow?

A. She never leaked.

Q. You say they knocked off over night and you slept aboard your boat?

A. Yes, I did.

Q. Now, what was done the next day, the following day?

A. The next day in the morning they started to load again and I said to the engineer, "You had better send a man to trim the cargo," for she was listed so much on one side.

The Court: What morning was that?

The Witness: The 13th.

[fol. 81] Q. Was that the morning that she spilt her load?

A. That was about twelve o'clock, yes, the morning she spilt her load.

The Court: Where was the engineer—how did you hail the engineer?

The Witness: He was on duty——

The Court: On the derrick?

The Witness: Yes, sir.

The Court: You told him what?

The Witness: The day before, to send a man to straighten the boat for she was badly loaded, so he said that she was all right; well, anyhow, about half-past eleven I hollered to him and he said, "Oh, the boat is all right."

Q. Who said that; repeat what was said?

A. I said to the engineer on the derrick, I said to him, "You had better send some men to straighten this cargo," and he said she was all right.

The Court: Had the list gotten worse?

The Witness: Yes.

The Court: From the loading that was done that morning?

The Witness: Yes.

Q. And how was the list then?

A. The list was the same side.

The Court: And worse?

The Witness: And worse. And the cargo slide down.

The Court: What is the texture of that cargo, is it sticky cargo that holds an upright position or is it like sulphur or——

[fol. 82] The Witness: It is something like mud.

The Court: Sticky?

The Witness: Yes.

The Court: So when you put it in one place it takes a good deal of a tip to slide it to another place?

The Witness: Yes.

The Court: If you put a lot of this cargo in one place you have to tip it a good deal to make it slide at all?

The Witness: It is like dirt—it is a thing that slides all the time.

The Court: It will slide easily?

The Witness: Yes. I said the color was like mud.

Mr. Martin: It is perfectly dry, your Honor, like dust, with lumps in it.

By the Court:

Q. Would you have been willing to sleep the night on her the way she was that morning?

A. Well, I had to be there to see what would happen.

Q. I mean the way you saw it that morning would you have been afraid to spend the night, the way she was then?

A. Well, something had to be done, I had to tell my company.

Q. I asked you whether you would have been willing—after all no one wants to be drowned like a rat on one of those things—you wouldn't have wanted to sleep on her the way it was that morning at 11:30?

A. No.

Q. And you did sleep there the night before?

A. Yes, sir.

Q. And it wasn't so bad then?

A. No, sir.

[fol. 83] By Mr. Eggleston:

Q. What did you do after you spoke to the engineer about 11:30 or twelve o'clock, and asked him to trim the cargo and he said it was all right?

A. He said it was all right and then when I went to my cabin I went around and looked her over and she hasn't much water then.

Q. Did you look down below?

A. Yes, sir.

Q. Did she have any water in her?

A. No. And I went in my cabin to finish my painting, and she was sinking——

Q. What do you mean by that?

A. Sometimes when a boat passes, do you understand, and the cargo commenced coming down all the time on the same side.

Q. The offshore side?

A. Yes.

Q. Did you come out of your cabin?

A. Well, I was there and I couldn't pay attention and I heard someone holler to me, it was the deckhand of the 36, and I jumped to the deck and she was pretty near going; I jumped on the derrick and then I tried to call the engineer and he wasn't there; I went to the ship then and someone told me the engineer went ashore for his lunch.

Q. What did you do then?

A. I run up to the dock and called my people and let them know the condition in which she was and when I come back she was pretty near over.

Q. Had some of the cargo gone off of her?

A. Yes, most of it had gone, and then there was a fellow and he said, "Go and cut your line on the bow."

Q. What fellow was that?

A. It must have been someone off the derrick.

[fol. 84] Q. Someone from the derrick?

A. Yes, and he cut the stern line.

Q. And what did you do?

A. I cut the bow line.

Q. Why did you do that?

A. To prevent her carrying the derrick with her.

Q. And then what happened to the scow?

A. Then she turned over.

Q. Were there any officers of the Cullen Company or any of your bosses on the boat there while you were loading?

A. No, there wasn't.

Q. Did any of your bosses or any of the officers give you any orders as to the loading of cargo?

A. Absolutely not.

Q. Did you have anything to do with loading the cargo?

A. I had nothing to do with the loading of cargo except take the care of my boat.

Cross-examination.

By Mr. Middleton:

Q. When you were taken in tow at 29th Street and towed down to Roosevelt Street were you awake?

A. Yes, sure.

Q. Did you have any difficulty?

A. No.

Q. And tied up alongside the derrick?

A. Yes, sir, I had to be.

Q. Were you lying in the slip bow in or bow out?

A. I was in the slip bow in.

Q. You were bow in?

A. Yes.

Q. Now, this derrick, is that the derrick of the Port Fueling Corporation—

Mr. Middleton: Is it admitted——

Mr. Martin: The derrick on the second day alongside of this boat which was being loaded is admitted to belong to the Port Fueling Corporation.

[fol. 85] Q. Were you alongside the same derrick the day they loaded you?

A. Yes.

Q. Did anybody at all deal with your boat when you were there other than those in charge of the derrick?

A. No.

Q. They were the only people that dealt with your boat at all; that is right, is it?

A. Yes, sir.

The Court: The same derrick both days?

The Witness: The same derrick.

The Court: And the same men?
The Witness: The same men.

Q. And you are quite sure there was nothing happened to her until she sank?
A. There was nothing happened to her until she sank.

Cross-examination.

By Mr. Martin:

Q. Do you remember going alongside of the U. S. derrick No. 2 opposite the second hatch on August 12th?
A. Yes, I do remember.
Q. And on August 13th do you remember being shifted down alongside of the Port Fueling derrick No. 2 to finish loading?
A. On the No. 2?
Q. Yes, from U. S. Trucking No. 2 derrick unto the Port Fueling derrick No. 2?
A. I don't remember.
Q. Will you say you weren't?
A. I remember I was alongside of one derrick and the same derrick that finished me out.
Q. What hatch were you loaded out of?
A. I don't know.
Q. Don't you remember taking part of your cargo out of the bow of the ship and then being later shifted to the [fol. 86] stern?
A. I don't remember nothing like that.
Q. Will you say you weren't?
A. I don't know; I was alongside of the ship when they were loading.
Q. Were you shifted from No. 2 hatch alongside one derrick down to No. 4 hatch alongside another derrick?
A. I couldn't tell you that.

By the Court:

Q. Now supposing this was a ship here. You have a hatch of the ship here and a hatch of the ship here (indicating); was there more than one derrick when you got alongside there?
A. There was only one, I remember one.

Q. Now, what this gentlemen is asking you in effect is roughly this: When you first went in there whether you weren't alongside of the derrick like that, with the ship bow in towards the dock, the first day, August 12, and then you moved back, were pulled along by the ship's lines or something like that, and put alongside of the derrick on the second day; do you remember anything like that?

A. I don't remember.

Q. You think you only saw the one derrick?

A. Yes, sir.

Q. And you think you were alongside the same derrick all the time?

A. I think so.

By Mr. Martin:

Q. Do you know what a crane is on a derrick?

A. A crane?

Q. Yes.

A. No.

Q. Do you know what an A-frame is?

A. No.

[fol. 87] Q. That boat that loaded you the first day had an A-frame?

A. I don't know anything about it.

Q. And on the second day the boat that loaded you hadn't an A-frame?

Objected to.

A. I don't know anything about it.

The Court: It is all right on cross examination.

Q. I understand you to say that you saw the boat was going over and you went out to phone to your people?

A. Yes, I did.

Q. How long had it been going over before you left your boat?

A. Well, it was about twenty minutes at least.

Q. And then you left your boat?

A. It was about twenty minutes when I went and called up my people, twenty minutes when I went and come back.

Q. How long did you notice your boat was turning over before you left your boat to call up your people?

A. Well, as soon as the man called me up.

Q. Well, give it to me in minutes or hours or whatever it was, how long did you see your boat turning over before you left your boat to call them up?

A. As soon as the man called me up I jumped on the deck.

Q. What man?

A. The man on the 36.

Q. Where were you?

A. In the cabin in my place.

Q. How did you get off your boat?

A. I jumped on the derrick.

Q. Then where did you go?

A. Then to the steamboat.

[fol. 88] Q. On the steamer?

A. Yes.

Q. How did you go up the side of the steamer?

A. Up the ladder.

Q. And then you get on the dock?

A. Yes.

Q. And where did you go on the dock to telephone?

A. I went somewhere to call him up.

Q. Up to the street?

A. The house is right on the end of the dock.

Q. What house?

A. Where the telephone is.

Q. Do you know there is a telephone on the end of that dock?

A. It is somewhere there.

Q. The telephone you went to was up on the street, you had to walk the length of the dock?

A. Then I went to the street to call him, it was not there.

Q. I am not asking you that; you went to the street?

A. Yes.

Q. Came back?

A. Yes.

Q. Climbed up on board the steamer?

A. Yes.

Q. Down onto the deckload and down onto your boat again?

A. And when I came back I didn't get on my boat.

Q. I thought you said that?

A. No, I meet the man, understand, all ready to cut the line, so he told me to run up to the bow and cut my line and let the boat go and that is what we do.

Q. And when the line was cut on the derrick the boat turned over?

A. Yes, sir.

Q. Do you remember at 11:45 that day you were notified that a tug was going to tow you out and you left your boat and went up and got lunch?

A. Who, me?

Q. You?

A. Not a bit.

Q. Didn't you tell the engineer that you were going up [fol. 89] to get lunch so you will be ready to be towed away?

A. No, I haven't spoken to the engineer only to tell him to have the cargo straightened.

Q. Now, on the 12th it was loaded with a big list to starboard, is that right, or listing offshore?

A. Yes.

Q. Did you make any complaint that day?

A. I did make a complaint the first day.

Q. Do you see any man in the room that you complained to?

A. In the room here—I don't recognize him; there is a man there that looks like his engineer.

The Court: Which man do you mean?

The Witness: The man with the mustache there.

Mr. Martin: Mr. Eberle, stand up. (To a man in the back of the courtroom.)

The Witness: The one back of the man with the mustache.

Mr. Martin (to another man in the back of the court room): Will you stand up. Is that the man?

The Witness: It seems to me it looks like him but I don't know the man.

Q. Did you speak to the same man on the first day that you spoke to on the second day?

A. Yes.

Q. There is no doubt about that?

A. No doubt.

Q. You were still in the same place?

A. I was still in the same place.

Q. And alongside of the same derrick?

A. Alongside of the same derrick.

Q. What did you say to him on the first day?

A. What is that?

[fol. 90] Q. What did you say to this engineer on the first day?

A. I told him to straighten my boat, to put the cargo right, that the cargo was wrong.

Q. What did he say to you?

A. He said it was all right.

Q. What did you say?

A. Well, I had nothing to say, I couldn't go there and shove it out myself.

Q. Did you go and complain on the first day to your owner?

A. To where?

Q. Did you go and telephone to your owner that you weren't being properly loaded?

A. No, I am not supposed to.

The Court: You didn't?

The Witness: No.

Q. How much of a list did you have the first day?

A. Well, I had quite a big list but I don't know how much.

Q. It looked dangerous?

A. Sure; I knew it was dangerous.

Q. You were in danger the first day with a heavy list?

A. Yes.

Q. You slept there the first night?

A. I did sleep there.

Q. You were afraid she would go over?

A. Well, I have to look out for myself.

Q. I suppose you stayed dressed that night, ready to go off if the boat went over?

A. I can't say that I stayed dressed.

Q. You didn't go away the first day, did you?

A. I did remain on the boat.

Q. And all that night?

A. All that night.

Q. And all next morning?

A. And all next morning.

[fol. 91] Q. And anybody could see that it was a dangerous list on the first day?

A. Well, I see it right away and I told the engineer.

Q. And you were fearful it would go over then?

A. I told him to straighten it, for I always want it straightened.

Q. And he would do nothing for you?

A. He would not.

Q. The second day the same engineer?

A. The same engineer.

Q. And the same place they continued to lead material on that side of the boat, is that right?

A. Only they moved the boat back and forth.

Q. Oh, they moved the boat back and forth?

A. Well they had to for the different hatches.

Q. Did they move it back and forth by the derrick?

A. They have to, to put the cargo in different places.

Q. Did they have it away from the derrick?

A. She was alongside the derrick all the time.

Q. But they moved it up and down to distribute the cargo in the boat?

A. Yes.

Q. And they continued to put the material on the offshore side?

A. They put some of it on the offshore side, of course.

Q. Did they put any on the inshore side?

A. Yes, but they put more on the offshore side.

Q. They continued piling more on the offshore side than on the inshore side, is that right?

A. Yes.

Q. Was there any man down on the boat?

A. Nobody.

Q. What kind of a bucket were they using?

A. The bucket, I don't know the name of it; it goes up and opens itself.

Q. It opens up like an orange peel?

A. No, like a clam shell or something.

[fol. 92] Q. How do they open it?

A. By the steam, I suppose.

Q. Well, do you know?

A. Well, I suppose I know, for I see them working by the steam.

Q. And there was nobody from the loading come down on your boat?

A. I didn't see no one.

Q. You didn't see anyone there?

A. No.

Q. Did you ever see that colored man (indicating a man in the back of the court room)? Stand up, please.

Whereupon a man in the back of the courtroom stands up.

The Court: Do you know him?
The Witness: I don't remember seeing him.

Q. Didn't you see him working on the deck of the boat, knocking the pin out to empty the bucket?
A. I don't remember.
Q. You don't remember?
A. No, I am not supposed to know anything about it.
Q. Now, all the morning of the 11th they continued putting material on?
A. Yes.
Q. Your boat continued listing more offshore—on the 13th, is that right?
A. That's right.
Q. That is the day she tipped over?
A. Yes.
Q. And she kept going down all the time?
A. She kept going down all the time.
Q. And how far down did she get on that side?
A. Well, she went down until the head went down in the water.
Q. Well, when they stopped loading her was she 3½ feet on that side?
A. When they stopped to load?
[fol. 93] Q. Yes?
A. It was about 3½ feet.
Q. On that side?
A. Yes, sir.
Q. How much on the other side?
A. On the other side I guess it was about 6, something like that.
Q. 6 or 7 probably?
A. Yes.
Q. So she was listing right over?
A. Yes, she was listing too much.
Q. So that she was tipped right over?
A. Yes.
Q. So one side she had only 3½ feet out and the other side she had 6 feet, is that correct?
A. Yes.

Q. Would you say she had 7 feet on the other side?

A. I don't know how many feet she had.

Q. That was really a terribly dangerous condition, wasn't it?

A. Well, sure.

Q. And you asked the engineer, with that terrible condition on there, to do what?

A. To straighten the boat up.

Q. To straighten the boat up?

A. Yes.

Q. He would have had to put half of your cargo over on the other side—It would take about half that was on one side——

A. The boat alongside was standing in the way.

The Court: Do you mean the water was 3½ feet below the edge of the rail as you looked over the side——

The Witness: Yes.

The Court: You don't mean the rail—do you mean the water was 3½ feet below the rail?

Mr. Martin: That isn't his testimony, your Honor.

The Witness: It is.

[fol. 94] Q. You told your counsel on direct examination when you finished loading your deck was 3½ feet above the water, didn't you?

A. My counsel?

Q. Yes.

The Court: He is your counsel, Mr. Eggleston.

Mr. Eggleston: He said no such thing.

Q. Did you tell him the boat was loaded on this occasion the same as others with your deck 3½ feet out of water?

A. I don't remember.

Q. You don't remember?

A. No. I didn't say anything like that.

Q. Well, let us get it now; do you remember telling your counsel this boat was loaded about as deep as it was the time you carried your brick?

A. Yes.

Q. And you told him that then your deck was 3½ feet out of water?

A. I told him always before when I had this cargo always she had been loaded 3 feet and 3 inches, something like that.

Q. Didn't you tell your counsel this time that she was loaded as she was before?

A. That is what I told my counsel.

Q. And that is, that your tug was 3½ feet out of water?

Objected to.

The Court: He can ask him anything on cross-examination.

Q. Wasn't that your testimony? Well, isn't that what you mean?

A. What do you say?

Q. That your tug was 3½ feet out of water?

A. The same as the last, she is very heavy then.

[fol. 95] Q. If you will answer my question—you told your counsel, when you finished loading on the morning of the 12th that your deck was 3½ feet out of water; is that correct?

A. Well, I said it was the same.

Q. The same as what?

A. It was the same as I told my counsel.

Q. Well, is that correct; that your deck was 3½ feet out of water when you finished loading that morning?

Mr. Eggleston: I object to the question.

The Court: You understand your vessel had a rail up like that (indicating)?

The Witness: Yes.

The Court: When you say it was 3½ feet out of water do you mean the water was 3½ feet below this rail or 3½ feet below the deck?

The Witness: It was 3½ feet below the deck; that is what I mean, sir.

Q. And on the other side was she about the same?

A. She couldn't be, for she had a list; how could she be?

Q. How many thousand bricks did you carry on that boat?

A. I don't remember. I never take any interest in that.

Q. You didn't do any pumping on the 12th or 13th, did you?

A. On the 13th?

Q. On the 12th or 13th?

A. I didn't have to do much.

Q. Did you or did you not do any pumping?

A. I didn't; I went there and looked and there was no water, the water went in when she commenced to go so——

[fol. 96] Q. Now, you said about twelve o'clock or something, your boat got a little swell; what did you mean by that?

A. A little swell? I didn't say that. I said every time a steamboat passed she gives a little swell and she swings a little; every time she swings a little, the cargo comes down all the time.

Q. Is that the time she took the list?

A. That is the time she took the list, that she went.

Q. When these swells came by?

A. When the swells come by she had a big list, and that is when she went.

Q. You have carried coal on that boat?

A. I don't remember carrying any coal while I was there.

Q. Do you remember carrying anything but brick?

A. I carried lumber.

Q. That is a light load?

A. Yes.

Q. Brick is a light load?

A. No.

Q. It is a heavy load?

A. Yes.

Q. You have often seen scows of that kind loaded with sand and gravel?

A. Yes.

Q. And they were loaded within 6 inches?

A. Yes, so if that boat——

Q. Have you had it loaded down even with the deck?

A. Many times.

Q. So that this boat, you have had loads in it so the deck would be even with the water?

A. Yes.

Q. And you have often had that?

A. Yes.

The Court: He had described a 15 degree list.

Q. Up until the lines were cut none of the cargo had gone overboard, had it?

A. Plenty had gone for the water was in the boat already in the deck and plenty of cargo has gone already.

[fol. 97] Q. The water when you cut your lines was up on your deck?

A. Well, of course, because she listed.

Q. When you cut your lines the water was up on the deck?

A. Before I did cut the lines the water was up there.

Q. Was it over your rail?

A. Why, sure.

Q. And how far over your rail was it?

A. It was on the cargo.

Q. It was up on the cargo?

A. Yes.

Q. What was your purpose in cutting the lines?

A. Well, I had to cut the line to prevent the derrick going with her.

Q. The derrick people didn't ask you to cut them, did they?

A. Well, when I went up one of the men at the line cut it already.

Q. What man?

A. One of the men on the derrick.

Q. He had the stern line cut already?

A. Yes, and he hollered to me to cut the other.

Q. You were going to be towed that day right after lunch?

A. They told me they were going to tow me.

Q. Who told you that?

A. The engineer said I was going to be towed all right in a minute, that is the reason he said there was no use to fix it.

Q. No use to fix it with the boat lying over on its side, is that what you mean?

A. Yes.

The Court: When you spoke to the engineer in the morning——

The Witness: He said, "Oh, you're all right, you are ready to go."

Q. Were they finished loading when you asked him to straighten up the load and send a man, after that was the [fol. 98] time he told you that you were going to be towed

out and there was no need of straightening it up, is that correct?

A. Yes.

Cross-examined by Mr. Middleton:

Q. You testified a while ago that in the course of being loaded you were shifted back and forth along the derrick, that is right, isn't it?

A. Yes.

Q. Who did the shifting?

A. Some of the men, I guess.

Q. The men off the derrick?

A. Yes.

Q. And do you know the capacity of your boat in tons?

A. No, I don't know that.

Q. And who told you you were going to be towed that afternoon?

A. The engineer tells me, he said it was no use, for you are ready to go.

Q. That is the derrick engineer?

A. It was supposed to be.

Q. Why did he say that?

A. Because he didn't want to straighten it.

Q. Did he tell you that when you asked him to straighten your load?

A. Yes.

Redirect examination.

By Mr. Eggleston:

Q. You said you had your boat loaded even with the deck, what kind of cargo was that?

A. Sand.

Q. Did you ever have your boat loaded even with the deck with other cargo?

A. Sand all the time besides brick.

Q. Did you have your scow loaded even with the deck with brick?

A. Yes.

Q. And when was that, before you went up to take the load of ore?

A. That was before I took the load of ore.

[fol. 99] Q. How long before, that you had her loaded with brick so she was down even with the deck?

A. I had this load on at the Erie Basin for four weeks, something like that.

Q. When did you discharge that load, with reference to the time that you went up to get the ore, how many days?

A. Well, I guess it was about three days, two or three days.

By Mr. Martin:

Q. I thought you told us on direct examination that with brick cargoes you were generally loaded with 3½ free board?

A. Yes.

Q. With the brick?

A. Yes.

The Court: Which did you do?

The Witness: I was loaded very deep with brick and laid for some time.

The Court: How near was your deck to the water?

The Witness: Many a time I can't tell you; sometimes it was 2 feet and sometimes 2½ feet.

The Court: From the deck or the rail?

The Witness: From the deck.

The Court: That would make more; if it was the rail it would be 3 feet more.

Q. They carry sand on these boats, too?

A. Yes.

Q. And with brick they have 2 or 2½ feet?

A. Yes.

Q. You never get less freeboard than 3½ with brick, do you?

A. How do you know?

The Court: He asked you that——

[fol. 100] A. I said I did.

By Mr. Eggleston:

Q. When they load brick on you sometimes they put on more of a load than at other times?

A. Yes.

The Court: Of course they do.

Q. Captain, you said they loaded this ore onto your boat with a bucket?

A. With a bucket, yes.

Q. After they dropped it off of the bucket what did they do?

A. They didn't do anything.

ALFONSE AVUSSO, being duly sworn and examined as a witness for the petitioner, testifies:

Direct examination.

By Mr. Eggleston:

Q. Who do you work for?

A. I work for Cullen.

Q. And what is your job with Cullen?

A. Anything for a boat.

Q. Are you a scow captain?

A. A deck scow.

Q. How long have you been captain of deck scows for Cullen?

A. For Cullen, fifteen years.

Q. And how long have you been captain of deck scows?

A. I am in the scow fifteen years for Cullen, twelve years for O'Brien & Fleming, five years for Cleary Brothers, three years for New York Trap Rock—all the time on deck scows.

Q. What scow are you on now?

A. 36.

Q. What scow were you captain of in August, 1925?

A. In 1925? Well, you mean on my boat?

Q. What boat were you captain of?

A. Cullen 36.

[fol. 101] Q. Do you remember the day that the Cullen No. 32 dumped a load of ore?

A. I don't remember—I know I was there.

Q. Did you see the acident?

A. Sure; I was there.

Q. Do you remember that?

A. Sure; I had a load myself of copper ore.

Q. Were you on the No. 36 when the No. 32 spilled her load?

A. Yes, on the 36.

Q. Where was the 36?

A. On the bow of the ship; the 32 was under my stern at the bow end.

Q. How long had your boat been alongside the bow of the ship?

A. Well, I can't remember; I don't keep no track; when I got a load they take me out.

The Court: Did you have a derrick there?

The Witness: Yes, sure, No. 2—digger No. 2.

Q. Did you take a load of ore onto your boat?

A. Yes, I had a load before 32.

Q. You loaded before the 32?

A. Sure.

The Court: Is your boat the same size as the 32?

The Witness: Yes, my boat is 114 feet long and 34 feet wide.

The Court: Just about the same size?

The Witness: Yes, 8 feet 6, and I have been on that boat—it is for sand or anything.

Q. From what part of the ship did you take your cargo, from the bow or the stern or amidships?

A. At the bow hatch No. 3.

[fol. 102] Q. Were you there when the Cullen 32 came in?

A. Yes.

Q. Did you see her loading?

A. Yes.

Q. What part of the ship was she loaded from, the No. 32?

A. What part of the ship she loaded—on the port side—I no talk good because I no go to school here—it is the port side.

The Court: The steamship was lying alongside of the dock?

The Witness: Yes.

The Court: And you were up near the bow of the steamship?

The Witness: Yes, sir.

The Court: She had two hatches?
The Witness: Yes, sir.
The Court: Where was the Cullen that turned over, the 32?
The Witness: She was on my stern.

Q. She was taking it from one of the stern hatches?
A. From one of the stern hatches, the 32.

The Court: There was a ship here and there is a hatch here and you laid at the after hatch?
The Witness: Yes.

Q. And there was a derrick between the Cullen No. 32 and the ship, is that right?
A. Yes.

The Court: There were two derricks there, were there?
The Witness: I don't know, I see one derrick.

[fol. 103] The Court: Was there one between the Cullen No. 32 and the ship, too?
The Witness: There was a derrick between the Cullen 32 and the ship and a derrick alongside the ship, and then the 32.
The Court: And that was the same arrangement you had with another derrick?
The Witness: Yes, sir.

Q. You saw the 32 go over, didn't you?
A. Yes.
Q. What time did the 32 start loading?
A. Well, when I see it they were working I see the boat give a list, they took the cargo all on one side.
Q. And which side was that?
A. The port side.
Q. Away from the ship or toward the ship?
A. They took it from the ship and put it on the scow.

The Court: The side of the scow that was toward the derrick or away from the derrick?
The Witness: One of the dippers took it and put it on the ship.
The Court: Here is the ship, the berth; you have your front hatch there and the after hatch there. There is the

derrick, we will say, that is lying here and a derrick lying like this along here; see?

The Witness: Yes.

The Court: And then there is your scow, the 36, which is lying like that and the 32 is lying like that, is that about right?

The Witness: That's right; that is my boat.

Q. And this is the bow of the ship?

A. I know that's the bow.

[fol. 104] The Court: Now the question asked you was, when they loaded the cargo on No. 32 did they load it on that side of the 32 or on that side of the 32?

The Witness: That is the 32. When they put it on the scow they put it all on this side (indicating the outboard side) and it slide all over on the rail.

Q. Did you see them dumping that on the 32?

A. Sure.

Q. After they dumped it onto the 32 and it fell out of the bucket what did they do on the 32? After they dropped it out of the bucket?

A. I see it giving a list.

Q. After they dropped the ore out of the bucket onto the deck of the scow what did they do with that stuff?

A. They put it on one pile.

The Court: Was there anybody there that was trimming it?

The Witness: No, nobody trimmed it.

Q. About what time of day was it that the boat turned over?

A. I don't remember for it wasn't so heavy—I don't keep no clock on my boat.

The Court: Did you see her turn over yourself, with your eyes?

The Witness: Yes.

Q. Before the boat turned over what did you do?

A. I stood on the side and see the scow giving a list and I said, "Cap," and he come out——

Q. Whom did you holler to?

A. To the captain of the 32 for he was inside. I said, "Come out and look; your boat is giving a big list." I [fol. 105] don't know what he said to the engineer.

Q. Did you see him talking to anybody on the derrick?

A. Yes, I seen him talking.

Q. When you hollered to the captain of the 32 did he come out?

A. Sure he come out.

Q. What happened?

A. He come out for I told him it was giving a list all the time but I don't know what he told the engineer of the derrick.

Q. Why did you holler to the captain of the 32?

A. I hollered to him.

Q. Why did you do that; what was happening?

A. I hollered to him for the scow give so much of a list.

Q. How about the cargo on him when you hollered to the captain?

A. It was sliding to one side.

Q. It was sliding when you hollered to the captain of the 32?

A. When I hollered to him he was inside the cabin.

Q. Which way was the cargo sliding when you hollered?

A. On the stern.

Q. Was it sliding to the derrick or away from the derrick?

A. On this side of the dock.

By the Court:

Q. Away from the derrick or toward the derrick?

A. Away from the derrick.

Q. Supposing that was the 32; was it sloping like that or sloping like this; show us?

A. When she dumped the load, that is the scow, it went over on this side, it was heavy and it took a list.

Q. How did she list, straight over that way or like this (indicating)?

A. She was list very much; I called the captain for I didn't want to see him drown.

[fol. 106] Q. Did you think it would turn over suddenly?

A. Sure; they come upside down at the Long Island Railroad dock.

Q. I mean, were you afraid before you saw that happen, that it would turn over quickly?

A. Oh, it go over easy, the captain jumped on my boat.

By Mr. Eggleston:

Q. You said when you hollered the cargo was sliding?

A. Yes.

Q. What made it slide?

A. Every little boat that passed by in the river makes a swell, you know.

The Court: And the swells hit the scow and she was tender—we have a phrase "tender"——

The Witness: One time I got my wife on the boat and she shrieked and he makes a funny noise——

Q. What was it that made this cargo slide when you hollered to him?

A. The swell made it.

The Court: You mean the scow 32 bumped against the lighter?

The Witness: Against the derrick.

The Court: And as it bumped this stuff which was on her, which was easily moved stuff and was heavy, was sliding off, it rolled off?

The Witness: It was a bigger boat, your honor. I got three or four loads more—the boat *when* down quick, it was heavy stuff.

[fol. 107] Q. Did any of the cargo go over the side?

A. Sure.

Q. Which side?

A. On the port side, I don't know what you call it.

Q. The outside?

A. The outside, yes.

Q. What did the captain of the No. 32 do when he came out when you hollered at him, if you saw him?

A. When he came out of the cabin he cut the bow line; I don't know who cut the stern line for I never seen it.

The Court: He cut the bow line as soon as he came out?

The Witness: Sure.

The Court: Did he go ashore?

The Witness: No, he jumped on my boat.

The Court: How far was he from your boat?

The Witness: He was here (indicating).
The Court: How far is your boat from here?
The Witness: That is my boat and that is his boat.
The Court: How far apart were they?
The Witness: Just like that.
The Court: How many feet?
The Witness: Oh, about two feet he jumped.
The Court: He jumped——
The Witness: He jumped on my boat.
The Court: After he cut the line?
The Witness: After he cut the line.
The Court: You didn't see him go ashore?
The Witness: No, no, no——

Q. Now, after the captain first came out of his boat, right after you hollered at him and he came right out, did he go [fol. 108] over on to the derrick then?
A. When he jumped the load——
Q. No, before that?
A. He was on the boat.
Q. And you hollered at him and he came up on deck?
A. Yes.

The Court: Tell us this; what he did when you hollered to him; he had bene painting his cabin and he came out?
The Witness: Yes.
The Court: Tell us slowly what happened?
The Witness: When I hollered I said, "Cap, you look out for your boat for she is listing and you might be dumping your load."
The Court: And what did he do?
The Witness: He come out and spoke to somebody.
The Court: On the derrick?
The Witness: I don't know for it wasn't my business for when I have a load I get out of there.

Q. Did the captain of the 32 go on the derrick?

Objected to.

The Court. What happened after that?
The Witness: He wanted him to trim the——
Mr. Martin: I move to strike it out. He said before he didn't hear any conversation between them.
The Court: Did you hear what the captain of the lighter said to the man on the derrick?

[fol. 109] The Witness: Oh, no, it was too far.

The Court: What did he do after he spoke to the man on the derrick?

The Witness: What did I do?

The Court: No, what did he do?

The Witness: I don't know for I was in my cabin; I was outside smoking my pipe, that is all, and he spoke to the man on the derrick.

The Court: Did you see him go ashore?

The Witness: No, the captain never came ashore; he stayed aboard.

The Court: How long after that did he cut the line of the light?

The Witness: He cut it before the boat started to go over.

The Court: How much time was there between the time you called him and the time he cut the rope?

The Witness: About twenty minutes. It takes quite a time for the boat to go down.

The Court: You say you thought it was fifteen or twenty minutes, something like that?

The Witness: Yes.

The Court: Your boat wasn't fastened to him?

The Witness: No, I have a line on the steamer and a line on the dock, on shore.

Cross-examined by Mr. Martin:

Q. Your boat was loaded all right?

A. Why, sure it was all right.

Q. You had no trouble up there?

A. No.

[fol. 110] Q. Your boat took her load on all right?

A. Yes.

Q. Let us take it easy, Captain, and I think we will get along. Yours is a deck scow?

A. Yes.

Q. And how high was it piled on your deck scow?

A. 10 or 9 feet high.

Q. And you had no difficulty with your loading; you were loading all right?

A. Yes, I was loading all right.

Q. Did the same people load you?

A. Sure, the same people.

Q. And you had the same kind of material?
A. Yes, sir.
Q. Copper ore?
A. Yes, copper ore.
Q. Were you loaded before the 32 was loaded?
A. Yes, sir.
Q. And were you loaded at the same place where the 32 was loaded?
A. Yes, sir, the same street.
Q. Were you loaded at the same hatch?
A. I was at hatch No. 3.
Q. Where you were loaded did you see the 32 in at the same place?
A. 32 never stayed at all; he stayed alongside of the ship, on the stern.
Q. Do you know the day you went up there?
A. Do I know?
Q. Do you know the date you went up there with your boat?
A. Oh, no.

By the Court?

Q. How many days had you been there loading?
A. I think two days, for we take the two boats in together, me and the 32.
Q. Do you mean you were brought down by the tugboat when the 32 was brought down?
A. Yes, they are towed together.
[fol. 111] Q. Were you down there when he was brought in?
A. Who, the tugboat?
Q. No; were you down there when the No. 32 was brought there?
A. Yes, sure I was there.
Q. You were ahead of him?
A. Yes.

By Mr. Martin:

Q. You weren't towed down by the same tug as the 32?
A. Yes.
Q. Were you in the same tow as the 32 coming down?
A. No, he come after me.

Q. Now, the usual way to load is that they put a bucketful in the center of the boat at one end?

A. Yes.

Q. And then go across from side to side, is that right?

A. Yes.

Q. And then they leave a little space and go a little further up the center and put a bucketful there, is that the usual way?

A. Now, listen—when the digger comes up he comes over and puts it on the deck, he don't care where he puts it.

Q. He puts it any old place——

A. For I was on my boat and I have to look out for my self——

(The witness shouts and is told by the Court that he must not shout.)

Adjourned until 10.30 A. M. November 14, 1930.

[fol. 112] 12.45 p. m. Nov. 14, 1930.

Trial resumed, present as before.

Mr. Middleton: May I ask the witness Santos one question I omitted yesterday, your Honor?

The Court: Yes.

Mr. Eggleston: I move to amend the libel to include the loss of effects of the captain of the scow and increase the amount of the libel by $250.

There is no objection.

EMANUEL SANTOS, recalled, testifies:

By Mr. Middleton:

Q. Santos, when your scow turned over, did all the cargo spill out in the river?

A. When she turned over the cargo all went.

Q. It all went in the river?

A. Yes, sir.

By Mr. Martin:

Q. I understood you to say you were captain of this boat for three years prior to this accident?

A. I was there for four years.

Q. On this boat?
A. On this boat I was a year.
Q. And were you on her constantly?
A. Yes, sir.
Q. Did you ever go to drydock with her in that year?
A. I don't remember.
Q. You don't remember going to drydock with her, do you?
A. No.
[fol. 113] Were you working for Cullen?
A. Yes, sir.
Q. For four years before?
A. Yes, sir.
Q. Did you know this boat?
A. Yes, sir.
Q. Very well?
A. Yes, sir.
Q. Do you remember her sinking in 1923, two years before that?
A. I wasn't there.
Q. You were with Cullen?
A. I was with Cullen but not on that boat.
Q. Do you remember here sinking in 1923?
A. I heard about it.
Q. She sank up at 29th Street with a cargo of coal on her?

Mr. Eggleston: I object.

A. I don't know; I heard she sunk but I don't know what she had on.

Mr. Eggleston: It has no relation to this case, your Honor.

The Court: It isn't much proof but it is a suggestion.

Q. Do you know who was the captain of this boat in 1923?
A. I don't know; I don't remember.

RUDOLPH H. SAMBRAUS, being duly sworn and examined as a witness for the petitioner, testifies:

Direct examination.

By Mr. Eggleston:

Q. Mr. Sambraus, what is your occupation?

A. Executive with the Cullen Fuel and the Cullen Transportation Company.

[fol. 114] Q. What office do you hold?

A. Vice president.

Q. Both companies?

A. I do.

Q. And how long have you been connected with those companies?

A. I have been connected with the Cullen since 1915.

Q. It has been testified that the deck scow Cullen No. 32 sank with a cargo of coal at 29th Street in 1923. Did the Cullen No. 32 sink with a cargo of coal at 29th Street at that time?

A. She did not.

Cross-examined by Mr. Martin:

Q. Did she sink in 1923?

Mr. Eggleston: If the Court please, I object to any examination of this witness unless it is strictly cross examination on what was brought out on direct unless Mr. Martin makes him his own witness.

The Court: All I want is to get at the truth.

Q. Did she sink in 1923?

A. She did.

Q. Where?

A. In Long Island Sound.

Q. What was on her at the time?

A. Sand and stone, gravel.

Q. You are the man who has charge of these boats for Cullen?

A. Well, if you want to call it such, yes; one of them.

Q. You keep records of these different boats?

A. We do.

Q. Keep repair bills?

A. We do.

Q. Have you the repair bill for the repair due to the sinking in 1923?

A. We have not.

[fol. 115] Have you any records to show when this vessel was in drydock prior to August of 1925?

A. We have not.

Q. You knew there was a suit pending here in quite a considerable sum?

A. I did.

Q. And you have not the records?

A. Not the particular records you are asking me for.

Q. I am asking for records of any shipyard?

A. No, we have not any records of any sort.

The Court: Does that refer to all the scows?

The Witness: Yes.

Q. How long do you keep your records?

A. As a rule we keep them five or six years.

By the Court:

Q. And the practice is the same now?

A. Your Honor, we had considerable trouble, we knew on two different occasions, certain of our records were stolen in 1927.

Q. It is a curious kind of a thing to steal.

A. They were taken with some other records at the time.

Q. What do you mean?

A. Some financial records were taken at the same time and we have been unable to locate these records; we have been looking for them perhaps a month or so now.

Q. Aren't there any records of 1927?

A. Yes, we have——

Q. What is the date of this?

A. This is 1925.

[fol. 116] By Mr. Martin:

Q. Then all your records prior to 1927, repair bills and surveys, have been stolen?

A. No, sir, not all.

Q. Have you any?

A. Yes, sir.

Q. Have you any of this date?

A. I have been trying to find the records for 1923, 1924 and 1925 for this boat, with a number of others, and we cannot find them.

Q. Were your ledgers stolen?

A. No, these were sheets and folders.

Q. Were your ledgers stolen?

A. Not ledgers, no.

Q. Journals?

A. No.

Q. Daybooks?

A. No.

Q. You have them?

A. No. These sheets were stolen.

Q. I am not asking you that?

A. We don't keep the records of the boats in the day books.

Q. But you keep the records of the money you pay out in the daybook and journal, don't you?

A. Oh, surely.

Q. Have you got them with you?

A. No, I have not.

Q. Your ledger and journal would show what you paid on these boats in 1923, 1924 and 1925, wouldn't they?

A. They wouldn't identify the particular vessel; we would give a monthly sum that we paid the drydocks.

Q. Do you mean to say your books wouldn't show the specific payments on a particular boat?

A. No.

Q. You have no entries specified in your ledger or journal to show that?

A. No.

[fol. 117] Q. What records have you?

A. In the records with the bills attached.

Q. Where do you transfer them from, these records or sheets, to what books?

A. We have a voucher system.

Q. I understand that——

A. Well, that is my answer to it.

Q. Is that your best answer?

A. That is my best answer.

Q. Now, do you transfer your vouchers when you make payments to your ledger or journal or any other book?

A. The amount, yes.

Q. And the name of the boat?

A. No, we do not.

Q. Then you don't know the amount that you pay out on a particular boat. Do you know from your ledger or journal the specific amount you paid out on a particular boat in 1923, 1924 or 1925?

A. No, I do not.

The Court: He says he doesn't. He says he would look up the vouchers and trace them back.

Q. Do your books for 1927 specify the boat and the particular repairs on her?

A. No.

Q. Where are those books?

A. Naturally at our office.

Q. Where is your office?

A. 192 Lexington Avenue.

By the Court:

Q. Where did this vessel sink in the Sound?

A. She came down in a tow with a number of other vessels that were sunk by the storm.

[fol. 118] Q. Where was she sunk?

A. Some place around Execution Light.

Q. Did she just go ashore?

A. If I recall correctly there were two or three scows at the same time in charge of a Moran tug.

Q. Do you mean sunk in a storm?

A. Yes sir.

Q. When you say sunk do you mean they were driven into shallow water and lay there?

A. Some were driven into shallow water; I don't just recall; my recollection is that the Cullen 32; she was damaged and she was sunk with a cargo and if I recall, she was originally brought into the College Point drydock, if I recall; I am not positive of that because it is five years ago.

Q. It was salved——

A. I remember her sinking at that time.

Q. She was salved and repaired?

A. Yes, sir.

Q. Is there any way of telling just what was done for her when she was taken out or do your record prevent your telling that. You ought to have a record of this vessel from that time on?

A. If I may explain the situation——

Q. Go on.

A. We did building work in 1923, 1924, 1925 and 1926. In 1926 our property was taken over by the City and we moved from down town, we moved up to 30th Street and from 30th Street we moved up to Lexington Avenue. Now, in addition to the records of the ships we have some records of ships and I would be glad to bring them down and show the Court—some of the records in our storeroom were disposed of, I don't want to say they were stolen but they were lost at the time by the person who was supposed to look after that particular work.

Q. You say the City took over your property?

A. Yes, we had some land at 30th Street and we were [fol. 119] required to move again, and our records I don't want to say to the Court that they were stolen on account of the reputation of the person who was supposed to take care of them, but they were lost with other records. There were three or four files completely gone. And in checking back for three or four months, I have had someone doing nothing else, there were some particular sheets for 1925 he was not able to locate. We have some sheets for 1924 that we found and some as far back as 1923. Those are daily loose leaf sheets that we keep in a big book.

The Court: We will have to deal with just memory, then, instead of the documents, I suppose.

By Mr. Martin:

Q. You say your recollection is that this boat was in tow of a Morgan tug when she sank?

A. I believe that was the case, yes.

Q. Didn't she sink lying at a pier?

A. No, I don't recall that she did.

Q. Well, will you say she didn't, you have given the impression she was in a tow at the time she sank?

A. That is my recollection, yes.

Q. But you won't say she didn't sink at a pier?

A. I will positively swear that she didn't sink at 20th or 30th Street.

Q. Was she ever repaired, or do you know?

A. Most assuredly she was.

Q. Do you know where?

A. No, I do not; I can't. I haven't been able to check that at all.

[fol. 120] By the Court:

Q. Who in your organization would know most about the history of this boat?

A. I would know as much as anybody; my recollection is that she was repaired by the Jersey City Drydock, but I am not definite about that; I am trying to check up these things; we have total sums of money in ledgers; we don't carry and itemize each particular bill in the ledgers.

Q. Don't you suppose that it may be true that you were operating a different way, might it be true that the system in the Jersey City and other drydocks would deal with each individually and you could go to them and find out about it?

A. Yes, I could do that and get the information.

By Mr. Martin:

Q. Have you endeavored to ascertain from the Jersey City or Hunts Point Drydock when this boat was in the drydock?

A. No.

Q. Made no endeavor at all?

A. No, I haven't, for I have been unable to find out from our own records.

The Court: He says he has been working on his own records very hard; and it apparently never occurred to him to go across the river and try to get those from the drydocks.

Q. Then you have nothing at all to fix when this boat was last in drydock previous to the sinking?

A. No, I have not.

Q. Was the boat repaired after the sinking that is involved in this action?

A. No, she was not; she was a total loss.

[fol. 121] Q. What did you do with her?
A. Used her as a little boat for repairs.
Q. As a float for repairs?
A. Yes.
Q. You were with Cullen since 1915?
A. Yes.
Q. You were with him before that, wasn't you, too?
A. Not in an official capacity until 1915.
Q. You became an official of the company then?
A. Yes.
Q. How long were you with him prior to 1915?
A. Well, off and on, I guess for three years.
Q. That would be 1912?
A. About that, I think.
Q. Is that when you think you first went to Cullen?
A. I think it is, yes—I wasn't continuously with Cullen at that time, until 1915 and in an official capacity.
Q. Have you any record showing where the 32 was built?
A. No, I have not.
Q. Do you know where she was built?
A. Some place up the Hudson River.
Q. Is that a guess, or do you know?
A. I know that to be a fact; somewhere up the river.
Q. Have you anything to show the date when she was built?
A. No, I have not.
Q. Is she recorded anywhere?
A. Not to my knowledge.
Q. She was a pretty old boat, wasn't she?
A. I don't know what you mean by an old boat.

The Court: Approximately how old was she; have you any idea?

The Witness: In 1915—1925, she was probably fifteen years.

Q. Wasn't she nearer twenty-five years old in 1925?
A. No, she was not, positively.
[fol. 122] Q. You have no doubt about that?
A. I am positive of that.
Q. Did you ever see her bill of sale to Cullen?
A. No, I never saw that.
Q. Was she built for Cullen?
A. I believe she was built either for Mr. Cullen or Mr.

Cullen's father; I don't recall.

Q. How long is Mr. Cullen's father out of business?

A. Well, he died in either 1916 or 1917.

Redirect examination.

By Mr. Eggleston:

Q. Mr. Sambraus, how much of a staff does Cullen maintain to repair his own boats?

A. Oh, probably four, six, eight men at times.

Q. And do your ledgers or daybooks or journals show the amount of time or the amount of work that your own men put on any one boat?

A. No, they do not; we have that on the payroll; that is all.

Q. After the accident to the Cullen No. 32 in the Sound that you have referred to, in 1923, what was done with the boat?

A. In what respect; do you mean about repairs?

Q. Yes.

A. Oh, she was repaired; there is no doubt about that.

Q. And after she was repaired what was done with her?

A. Put back into service; we used the boats all winter for coal.

Q. And was she continued in service after that?

A. Oh, surely; that is, it is the sinking of 1923 you are referring to now?

Q. Yes.

A. Correct.

[fol. 123] Recross-examination.

By Mr. Middleton:

Q. In your capacity as vice-president of the Cullen Company do you keep an eye on your various boats with reference to their seaworthy condition or do you leave that solely to Mr. Sweet?

A. Well, up until 1929 I was very much interested because I was right at the work all the time at 29th and 30th Street and there wasn't a day that went by that I didn't see a considerable number of boats in the slip down there.

Q. Did you conceive it to be part of your duties in 1925 to inspect the boats for seaworthiness?

A. Yes.
Q. Did you inspect the 32?
A. No.
Q. You left that for Mr. Sweet?
A. Yes, sir.

By the Court:

Q. What is he called?
A. He is in charge of the captains and marine office.
Q. You call him the head of your marine department?
A. Yes.

By Mr. Shortridge:

Q. Was Mr. Sweet the manager of the work that you describe as taking care of the repairs of your boats?
A. Well, sort of superintending the men, for he was continually there.
Q. Who was his immediate superior in that work?
A. Myself, personally.
Q. And you were an officer of the company at that time, were you not?
A. Yes, sir.
Q. Mr. Sweet was not an officer of the company?
A. No, he wasn't.
[fol. 124] Q. And you say you didn't personally inspect this Cullen 32 at that time?
A. I don't remember.
Q. But you did inspect her?
A. Yes, sir.
Q. When?
A. I couldn't give the dates.
Q. Could you give me the month?
A. No, I don't think I could.
Q. Can you give me the year?
A. Well, as I said before, up to 1929, I made it my business every once in a while to go down and check up.
Q. I don't know what you mean by your business, but I want to know when, before this accident in 1925, was the last time you inspected this boat?
A. I can't say.
Q. You wouldn't be able to say that you inspected her within a year?
A. Oh, that would be positive.

The Court: Had you gone in it down below?
The Witness: Oh, yes.

Q. How far do you go; do you go with a flashlight?
A. No, we go right through the scow.
Q. What do you do when you go down?
A. You go down with a flashlight and walk through and look at the beams and go down the other end.
Q. And is that the extent of your inspection?
A. Look at all the beams.
Q. That is all you do?
A. Yes.
Q. That according to Mr. Sweet takes three-quarters of an hour?
A. About that.

The Court: What else could you do?
The Witness: There isn't anything else you could do.

[fol. 125] Q. This inspection, of course, is made when the boat is light and drawing about 2 feet, isn't it?
A. Yes.
Q. You don't know when you made such an inspection last before the boat sank in August, 1925?
A. I don't know the exact time, no, not on this particular boat.
Q. And the duty for such an inspection, you say was entirely passed over to Mr. Sweet as far as this boat is concerned, is that right?
A. Yes.

The Court: All the boats, he said.

Q. But you relied entirely on Mr. Sweet's inspection to determine the condition of this boat, is that right?
A. No, I don't think I want to put it that way; I don't rely on any one particular man at all.
Q. Well, so far as the condition of this boat immediately before she went on charter on August 11, 1924, is concerned, you did rely on Mr. Sweet?
A. Not particularly.
Q. Who else did you rely on?
A. There was his brother there and a foreman caulker.
Q. I thought you told me a moment ago that Mr. Sweet had this duty?

A. It was his duty but everyone needs a little checking up once in a while.

Q. What checking up did you do?

A. I get a little information from the other men once in a while and I check up on that.

Q. When did you do that?

A. I don't know any particular day; I am doing it every day in the week.

By the Court:

Q. For instance, to see that Mr. Sweet was doing his duty?

A. Right.

[fol. 126] Q. And you asked somebody about that, about Mr. Sweet and when he went on such and such a boat?

A. Yes, and particularly I recall at that time, here was a case where we had a scow in some work where they have taken some pipes and they have broken them and broken some deck beams and a report came from one of the men about broken deck beams and I particularly requested Mr. Sweet at the time for I wanted particularly to see at the time if there was any broken deck beams and I particularly recall that he was at that time there and he has ever since gone through the boats, and to see if there are any broken deck beams you have to go in that boat to find it out.

Q. Broken deck beams is one thing, but you can't discover leaks above the water line when she is light, you have to guess at it?

A. No, you can't; you do have to guess at it. You may find a little sweat inside but if there is a leak at the time the men usually tell you about it soon enough; you know it.

By Mr. Shortridge:

Q. Then this all falls upon Mr. Sweet except that you relied in the question of leaks on the master of the barge?

A. No, we do not; not if the barges come up to our plant where we have the opportunity of giving them a thorough inspection.

Q. Well, unless something has happened to her on a previous charter, if she comes off a charter one day and goes on another a day or two later you don't search the entire length of every seam on that boat, do you?

A. No, we do not.

Q. You depend on the barge captain to tell you whether she leaked on the last charter?

A. Right.

[fol. 127] Q. And so far as leaks are concerned you are relying always on the barge captain to tell you whether she has leaked previously?

A. Yes, unless the vessel comes to our yard.

The Court: If the vessel comes up to 29th Street?

The Witness: Right.

The Court: And you know this vessel was up there just before she was on this charter?

The Witness: Yes.

By Mr. Martin:

Q. Does Mr. Sweet make reports in writing?

A. No, he does not.

Q. Did he at that time?

A. No, he did not.

Q. Everything he does is verbal?

A. Well, I don't quite understand the question, when you say everything he does.

Q. I mean in respect of boats—all reports in regard to inspecting boats are verbal reports, talk to you?

A. No; in case there is anything wrong with the boat it is repaired.

The Court: He writes you a letter?

The Witness: No.

Q. And they would have been lost, too?

A. I don't say they would have been lost.

Q. You say the boat was carrying coal in the winter of 1923?

A. No doubt she was.

Q. And 1924?

A. No doubt she was.

Q. That is a deck scow, isn't it?

A. Cargo.

Q. Is that her principal trade?

A. That is not her principal trade; that is a trade that [fol. 128] takes the place of it when the slack time comes for the deck scows.

Q. How was the trade in 1923, 1924 and 1925; was it pretty slack?

The Court: He means that the winter trade is coal.

Q. Whom did you ever carry coal for?

A. Goodwin-Gallagher.

Q. When?

A. In 1922.

Q. In 1923 or 1924?

A. I don't just know.

Q. Or 1925?

A. I am not in a position to state the dates or anything like that.

Q. Will you say this boat carried sand or gravel for the Seaboard Sand & Gravel Company or Goodwin-Gallagher in 1923, 1924 or 1925?

A. In 1923 I will, yes.

Q. I mean subsequent to the sinking of 1923 and subsequent to the sinking of 1925?

A. I will, in 1923.

Q. Prior to the sinking or after?

A. Prior to the sinking in 1923 she was working for the Goodwin Sand & Gravel.

By the Court:

Q. She couldn't have sunk in very deep water?

A. She would throw her deck load off and sink decks to; they don't usually go down unless they throw the cargo; a scow will usually throw the cargo off the deck; it is very seldom they sink with all the cargo on.

Q. What are the causes which make her sink?

A. There are many causes, the way the cargo is put on them.

[fol. 129] Q. I shouldn't think you would get play there with the cargo on long?

A. There are other reasons.

Q. What are they?

A. Well, they fill up with water when she has a cargo on.

Q. Or have a little leak and fill up by degrees?

A. Well, in a case of that kind I have never been on a scow yet that sunk, personally, so I really don't know the actions any more than I have heard and I have heard so many different stories of what can happen——

Q. What about these wooden longitudinal divisions of a scow like the 32, they aren't watertight?

A. No, they aren't.

Q. And if there was much water in them they might prevent the sudden rushing of water from one side to the other; aren't they solid?

A. No, they have scuppers cut in.

Q. They are just for the construction?

A. They are just for the construction; the longitudinal bulkheads really only run from the sills up, that is, the longitudinal sills, that they have in there. We have a model here that I brought down, your Honor.

Q. Does that show pretty nearly?

A. There is something they have in there in case a vessel—I think there is a longitudinal bulkhead in there, too.

By Mr. Eggleston:

Q. Mr. Sambraus, how long has Mr. Sweet worked in the marine department for the Cullen Company?

A. Well, he has been connected with us since 1917, I believe.

Q. And how long had his work been connected with the building of boats for the Cullen Company?

[fol. 130] A. Well, about 1920; I don't recall the time.

Q. And have you had occasion to observe what kind of work he did?

A. Oh, yes.

Q. How is his work?

A. Well, he wouldn't be with me today if he wasn't all right.

Q. You said you used to inspect boats yourself; did you use to inspect the entire fleet?

A. Oh, yes, at one time I did.

Q. That was prior to 1929?

A. That was prior to 1929.

Q. How long would it take you to go around the fleet inspecting the boats—how often would you make the rounds of the fleet?

A. How large a fleet?

Q. The fleet of boats that you had in 1925; how long would it take you to go around all the boats of the fleet?

A. It would depend on where they were located, but we

have twelve or fifteen boats of our own all the time at 29th or 30th Streets.

Q. How long would it take you to go around and inspect all the boats of that fleet?

A. It takes three-quarters of an hour to go through a boat.

Q. You said you didn't know the exact date you inspected the 32 in 1925. Now, can you tell us how long it would take you to make a complete inspection in 1925 of all the boats you had—how often would you make the rounds?

A. Oh, you might look at a boat every week or once every two weeks, or I might not see them in a month.

Q. What would you say was the longest time that you had seen No. 32 prior to the time she went under charter; what would be the longest time since you had seen her?

A. Oh, I don't think it would be more than—I can't recall, I don't know exactly the time, I didn't keep a record [fol. 131] of every time I went down in them but I may have gone down in one boat twice a month and maybe not even see her again for two months.

Q. Well, what would be the longest——

A. Perhaps six months.

Q. And what was the condition you found the 32 in when you last saw her?

Mr. Martin: That is immaterial unless we have something definite.

The Court: When did you last see her and inspect her yourself?

The Witness: I don't know, your Honor, whether it was a month or——

The Court: Well, you examine him.

The Witness: Within six months prior to her last sinking.

The Court: And you actually went on her and went through her the way Sweet described?

The Witness: Yes.

The Court: And what was her condition then?

The Witness: Very good.

The Court: And you think that would be in the early part of the winter 1924-1925?

The Witness: Yes, it may have been after that; may have been only a month.

Q. When you made the inspection you say you examined the interior; did you examine the outside?

A. As much as you can see.

Q. The planking on the outside or the caulking?

A. Yes; if there was a boat alongside, that is the time you get a good opportunity to look at them.

[fol. 132] Q. Did you do that with the 32?

A. I don't recall that.

By Mr. Martin:

Q. The inspection consisted of walking through the boat as you told us and standing on the boat or the dock and looking at the boat?

A. Well, probably on a boat alongside.

Q. Well, standing on something, a loaded boat or the dock or something else and looking at her?

A. Yes.

(Adjourned until 2:30 P. M.)

Met pursuant to adjournment at 2:30 P. M.

Present: As before.

FRANK GARDNER, being duly sworn and examined as a witness for the petitioner, testifies:

Direct examination.

By Mr. Eggleston:

Q. Captain, what is your occupation?

A. Marine surveyor and appraiser of ship's property.

Q. Now, will you tell us briefly what experience you have had as a surveyor?

Mr. Martin: We will waive it.

Q. I would like to have a little of it on the record.

A. I first had to do with ships as a boy in the yards in Nova Scotia; after being in the yards a number of years I went to sea as master of ships, British license since 1890, [fol. 133] and I had to do with American ships, got an

American license in 1900 and from then on I was continually repairing and supervising in both sail and steam and inland trade.

The Court: All inland trade?

The Witness: No, both; my certificate called for any ship on any ocean.

The Court: I mean repairing?

The Witness: Yes.

Q. What experience have you had in the surveying and repairing of barges and deck scows?

A. Well, I have been working both for the underwriters and the owners making repairs.

Q. For how long?

A. Fifteen, seventeen years.

Mr. Eggleston: If the Court please, I have a model here of a deck scow; it isn't a model of the Cullen No. 32. I think Captain Gardner can answer any question your Honor is interested in in deck scows in general.

The Court: You didn't have as many fore and aft strengtheners in that vessel?

Mr. Martin: The other one was differently built, the other was a bulkhead boat.

By the Court:

Q. This is a stronger construction than the other one? This has been described to me as having three fore and after bulkheads which were not watertight, which were called bulkheads and which divided the lengthwise dimen- [fol. 134] sions of the scow into substantially three equal parts?

A. That's right.

Q. The 32 I am talking about?

A. Yes.

Q. Now, the illustrative model (which has been placed on the bench) is not the same as that and is much more strongly constructed, I should suppose?

A. I beg your pardon, your Honor; it is not as strong. These are X braces. Take this X-brace here, but the least little twist you will twist them, but the fore and aft you don't twist them. If you take a cargo on her you will twist her quicker than the one with the bulkhead, and the one with the bulkhead also has braces in her.

Q. It has also some athwartships in connection with the sides and these bulkheads?

A. In the shape of knees; you see these knees here——

Q. And you think that the lengthwise construction is stronger?

A. Yes.

Q. Which is the most modern?

A. Some are building this way because it is cheaper, but it is not as strong as are bulkheads. They give more longitudinal strength and there is less twist in it.

Q. As far as the deck is concerned, is this substantially the same as the 32?

A. The same thing.

Q. This side and the bitts and the hatches forward and the house?

A. Approximately the same. These decks go crosswise and the bottom planks go crosswise.

Q. So you think—I can see that the lengthwise bulkheads——

A. It is edge-bolted, too.

Q. —would make a stronger construction than athwartship because it wouldn't allow so much twist, is that the idea?

A. Yes.

Q. And it would have just the same beams along the deck——

A. Everything the same.

[fol. 135] Q. Everything the same except this strengthening would prevent—well, you say prevent dislocation or twist?

A. Yes.

Q. And when twisting would bring them back quicker?

A. Yes; and those things would lead off under the deck.

Q. I see what you mean. I don't see that it has much bearing on the case but I see that point. What else have you?

By Mr. Eggleston:

Q. Captain, did you inspect the Cullen No. 32 in August, 1925, at the foot of Roosevelt Street?

A. I don't think it was 1925. If you will allow me to look at my survey report (referring to his report); I have it here marked.

Q. At the foot of Roosevelt Street?

A. That was August 13th.

Q. You saw the Cullen No. 32 at the foot of Roosevelt Street?

A. I saw her there.

Q. That was after the accident?

A. That was after the accident.

Q. Will you tell us what you found there and what you did?

A. I found that that boat was turned over. There was about 8 feet of her hooked over the end of a Long Island carfloat and that had broken up the top log and covering board and the side of the boat so that she was more or less in the shape of an anchor stock on that side.

By the Court:

Q. Was she in shape then for anybody to make a diagnosis of what caused her to turn over?

[fol. 136] A. I don't think so, your Honor; there was too much of her under water.

By Mr. Eggleston:

Q. When next did you see this boat?

A. At the Jersey City Drydock at Jersey City.

Q. Will you tell us what you did in the way of inspection, up at the Jersey City Drydock, and what you found?

A. We held a survey for all the damage that could be attributed to striking the piling when she turned over at the bow, striking the carfloat and the consequence of having sunk was that the hatches had floated away on her turning over; one consequence of her turning over would be the cargo had started to rip the coamings off the side which would take the covering board and the freeboard strake probably with it. And we made a note of all those damages and reported on them.

The Court: Who was there at the survey?

The Witness: If I remember rightly—I could tell by looking at my survey.

The Court: All right.

The Witness: There was Herbie Morrison.

The Court: Whom did he represent?

The Witness: The Shipyard.

Q. He is dead now?

A. Yes, he is dead; and A. H. Dumont of the Home Insurance Company.

Q. Whom did you represent?

A. I represented the Cullen Barge Company.

The Court: Was the Long Island Railroad invited to be present—did anybody represent them?

[fol. 137] The Witness: There were others there but I am not sure—it is a long time ago, your Honor. There were six or seven there but who the others were I don't know. I know Captain Bagger was there.

The Court: Old Captain Bagger?

The Witness: No, William Bagger.

The Court: He is a son?

The Witness: And I think Frank was on the one at Jersey City.

Q. Whom did the Baggers represent, if you know?

A. I think they told me they represented the cargo.

The Court: You don't know?

The Witness: I am not sure.

The Court: Is there any question that this was an ex parte affair?

Mr. Eggleston: The Long Island naturally wouldn't be there for Cullen wasn't looking—for the Cullen Company——

Mr. Martin: We weren't there.

The Witness: There was more there besides Captain Dumont and Captain Bagger.

Q. Tell us what you did in the way of inspecting the boat and what damage you found in general; you may refer to anything to refresh your recollection?

Mr. Martin: I have no objection to the survey being offered to show that these things were found broken on the boat when he looked at her. I don't want it admitted as in any way binding on me.

[fol. 138] Q. Is this the original survey?

A. Yes, a copy of it.

Q. Will you tell us in general the nature of the damage you found on the boat?

A. Well, at first the cabin was damaged. Do you want me to go over it all?

Q. In general?

A. Well, the cabin was damaged. The hatches, which usually float off, were gone. The side of the vessel, the top log and the cabin board——

By the Court:

Q. The top log on which side?

A. On the starboard side. And the top log on the port side was broken when she fell over. The covering had gone away on both sides and a number of planks.

Q. The top log was broken on both sides?

A. No, it was splintered on one side—at least I am not sure until I read this thing.

Q. Well, get it right?

A. Cabin broken and damaged, to be new; necessary doors and lockers as before. One piece of sill broken to be new. Stern capstan broken, to be new.

By the Court:

Q. There is no use reading it into the record. Just say what were the notable things you saw?

A. On the port side, top log broken to be new—

Q. What side was that?

A. That was the side that was against the derrick, the hoist.

Mr. Martin: Well, wait a moment; not when you saw her, when she was turned over?

[fol. 139] The Witness: I saw her when she was turned over.

The Court: As she originally lay, as I understand it, this end was out toward the river.

Mr. Martin: I think it was bow in.

Q. All right; top log on the port side broken, you say?

A. Broken. 12 pieces of decking broken port side, to be new; 8 pieces of decking broken in salvaging operations. Bow chock rail broken, to be removed and replaced on new rail; one bow hatch cover damaged, to be repaired; forward capstan cover missing; bitt cavills broken; two main beams broken; 16 deck carlins; 9 knees broken, to be new; 11

knees to be removed and replaced, if broken to be new; 5 wing bulkhead knees to be new; one kingpost——

Q. What is the bulkhead knee?

A. You have bulkhead knees—and it is fastened on just like that (indicating to the Court on the model). Top strake of one wing bulkhead broken, to be installed in one piece; that first strake below top log was broken——

Q. Which side?

A. This is all on the port side, your Honor. Third strake below top log, sixth strake below top log, second strake below top log; scarves and bilge logs started, to be refastened after being set back in place. She fell over like this and broke all these planks and she opened this way, too (indicating on the model); scarves and bilge logs started. This happened when she was hanging over the bow in this shape.

Q. You mean sprung out?

A. Sprung out, and naturally these scarves opened. [fol. 140] Now, all scarves in fore and aft keelson to be refastened where started.

Q. That was the recommendation?

A. Yes, wherever they were found started it was damaged. Well, this is the starboard side: Lower course of log rail broken. This is the lower course here.

Q. What do you mean?

A. This cargo rail, you may call it, the lower course was broken. The middle course and the top course of log rail were broken. The anchor stocks were broken; two corner rail irons to be removed, faired and replaced.

(The witness explains to the Court what this means.)

A. (Continued.) Staving on both corners to be removed and renewed. Five pieces of decking broken, to be new; there were six kingposts broken; there were nine 6-inch knees broken. Ten knees to be removed and renewed if broken on removal. Two wing bulkhead knees broken to be new. One rider knee broken to be new. There was a lot of flooring and bulkheads on both sides at both ends missing to be new. There were four center bulkhead knees broken to be new. Forward and after cargo bulkheads broken and damaged, to be repaired. There were two deck pump and piping to be overhauled and put in working order; one deck plank lifted over each force and aft

bulkhead after boat is set back in line bulkhead to be edge bolted with five foot bolts. To strengthen this vessel we took up the deck planks, every other one to refasten that fore and aft bulkhead. They don't put it down through the deck planking, it is too heavy.

Q. These are the things that you were going to do.

A. To put her back in her same condition.

[fol. 141] Q. Is that approximately all?

A. No, there is a little more. There were 11 bottom planks broken, to be removed and renewed; 4 corner rake wearing pieces broken to be new; all bitts where started to be set back to place and refastened

Q. Don't read them. You have covered practically all that was noticeable, anything that you could possibly base a diagnosis on of what happened?

A. Your Honor, we went all over this boat looking for the damage that had been done by turning over, striking the dolphins, the piling and hanging on the bow of the boat and we couldn't find anything that had to do with the boat that would cause it.

Q. You mean to say she was tight then?

A. No, but outside of this, that was all we found that was the matter with this boat.

Q. It sounds to me like an old injury as you read it to me; but isn't it possible for a man of your experience to say that some part of that was due to the blow she received when she struck the piling and the Long Island lighter, probably; all you could do was to assume it from experience, that it was probable and that something else was due to some other cause?

A. If there had been anything due to any other causes, other than striking—when she turned over and the cargo went off—and striking the bow—this reasoning leads up to what we would say is the result.

Q. So it doesn't take you back to the cause of the sinking in any way?

A. No, not the sinking.

Q. Now, have you ever seen or had occasion to examine any other deck scow similar in a general way to her which had a similar thing occur to her?

A. I must have examined in my time forty of them.

[fol. 142] Q. I suppose it is seldom a deck scow when it

turns over is so malignant as to hit something else; it generally turns over and dumps her cargo?

A. If you have pig iron on, or copper bars and she started to list over; as soon as the iron started it would take this rail off, and the hatches, and it would all go overboard. It would break this other plank and the chances are it would all go overboard, and the boat might go back on her bottom.

Q. Is the deck watertight?

A. The deck is watertight, but when the pig iron would go off her it would split this rail and the filler work.

Q. That is to keep the water from getting in the hold?

A. Yes, but if the pig iron started to slide it would go so quickly that it would all go off before the boat turned over. If you put sand or gravel or trap rock on or a cargo such as this boat had on with a boat like this it would hang on like this.

Q. It would keep dribbling off the top all the time and it would change and change and change, and it would tip this thing over a little bit and when the angle got sharper it would run off more and more and you wouldn't get rid of it until it got to the angle of repose. You understand that?

A. I do.

Q. With a cargo of any kind, sulphur or clay or mud, it will stop where it is when you pile it up?

A. With a cargo like this it would go on an angle a litfle less than soft clay, what you call an angle of repose we call a natural angle.

Q. Angle of repose is a word of art. What is this?

A. It is copper ore.

Q. Well, it is what they call—this copper ore, isn't it lumpy?

A. It is lumpy.

[fol. 143] Q. Not a very sticky substance?

A. There is nothing sticky about it at all. The angle of repose is a little less than coal, for coal has sharp lumps and this is round.

Q. Therefore it is flatter on the angle of repose?

A. Yes, it is flatter but it will move quicker, for coal has square lumps and this has round or a similar shape lumps.

It will shift a little quicker than coal—soft coal I am speaking of, not hard coal.

The Court: If, as one of the witnesses testifies yesterday, the scow listed over so that the starboard side of her deck away from the hoister was only 2 feet above the water, that would mean a list of substantially 15 degrees.

Q. Now, that is quite a list when you look at it?

A. Do you want my opinion of it?

Q. Yes.

A. My opinion is that if any cargo was liable to shift it was a dangerous list.

Q. Was this copper concentrate?

A. Some, not a great deal.

Q. Would it start to shift at that list?

A. Oh, yes, the top would, not the bottom.

Q. But sliding and shifting are different things?

A. When they start to load these boats they dump it on the center line, then it becomes packed and the other all goes down——

Q. It slides off on each side?

A. It slides off on each side.

Q. If a man comes along with a cart and he bangs it down you think you can remedy it?

A. If you throw gravel or dirt down with a shovel, to show you how much difference it makes in the packing—[fol. 144] certain men can put loads of salt—you can put in salt so it won't go up on your cargo, so it won't pack. The same here. If you put the copper ore in and start at the center line and let it drop from your tub or scoop or anything, as the other comes on the deck it will continue packing; but if you start on the side of the boat and give a list there it will be more solid and she will have an original list from the start.

Q. I see.

A. And the only way to offset it would be when they load it they would have to put some on this side.

Q. You would have to get a similar packing on the other side?

A. You would have to pile higher. Soft coal in the hold of a ship will pack so tight you have to pick it out.

Q. Now, the packed area extended fore and aft?

A. On the center line.

Q. But if you put it on the side you have it there?

A. Yes. It is the first half of the load that is packed, or a quarter.

Q. Well, now is this a fair statement that I have got down here: If you load a scow in the center at first with material like this or approximately like it, coal or anything like this, you have as an effect of the impact of the various draughts a packing of the cargo in the center and you have a scow that will not materially list one way or the other?

Q. If, however, you start loading on one side or the other——

A. Or near one side.

Q. —and do it the same way that you might have done it in the center, you have a fore and aft area of packed cargo which is of course slightly heavier in its cubic foot than the unpacked cargo, and it will tend to list one side or the other. Then if you try to remedy that kind of loading [fol. 145] by putting a similar fore and aft packing on the opposite side you get a tender boat, I suppose?

A. But, your Honor, when this is put on this side and packed, this stuff is run across to this side; you couldn't start on this side again and pack it; you would have to shovel it over considerably more and instead of having it come up like this you would have it come up like that; you would have to have a top (indicating).

Q. But the net result if you have a list of any kind and try to remedy it by loading on the other side, whatever method you follow, the result is that you have a boat with a greater tendency to tenderness than if you load it in the first place and let it dribble off the side?

A. Yes.

Q. That is, I should think so. Mind you, I know very little about this kind of water craft. Is that the point?

A. I think it is.

Q. How much can you tip one of those vessels with cargo on her safely; if this doesn't give way, if the cargo doesn't tear it out and cause a leak, if you have a perfectly sound boat, how much can you tip; I suppose it would have to tip quite a little?

A. It depends on the cargo, your Honor, whether it was shifted. If you take brick, of course it isn't liable to roll down or shift; you know just what you have; but if a cargo is liable to shift I should think a point of 10 or 15 degrees would be the limit, especially with any cargo that is likely to shift. Of course, your Honor, I must tell you this, so as not to be misleading, deep down, say that boat was 2 feet deeper, she will have less list than one that is shallow for this body is big, and the more you shove this down in the [fol. 146] water, the greater pressure in the water—the deeper the boat the less list she is likely to turn over with, with the same cargo on the deck.

Q. In other words, if you have a raft it is harder to turn it over?

A. I wouldn't say that, for there is water all around it. But a very shallow boat will not turn over as quickly as a deep boat of the same width. We have scows in New York of copper, McAllister's boats, and they are shallow beneath. That is, a 12-foot boat will turn over quicker than a 10-foot boat of the same depth.

Q. You mean depth of side?

A. Depth of side.

Q. We are talking about depth of side here, not draft of water.

A. Yes, depth of side.

Q. With the same shaped bottom all round?

A. Yes.

Q. Well, did you ever know one of these boats to turn over if she didn't have any water in her?

A. I never could tell whether they had water in them or not.

Q. You have examined these boats for damage by accident many, many times and do you mean to say that unless you hear water trickling into them they are not leaking?

A. There must be some phenomenon, there must be something to pour this thing out, I will call it traumatic, but whether it was due to a leak that developed as they went lower and lower and the water came in stronger as the pressure of the cargo rolled the boat around, or you would call that an organic defect in the boat—isn't there any way of telling?

A. Most of the boats that we have are coming from Port Jefferson, up Long Island Sound, and I don't know of any that turned except in heavy water, and they strained.

[fol. 147] Q. They must have got water in them?

A. Yes, but they were loaded decks to the water, not more than 6-inch freeboard to the leak. And the water in those boats may have gone over into the hatches.

Q. I was thinking about here in the harbor where things are calm and every now and then you hear of a scow turning over and dumping her cargo?

A. Well, I have known a lumber boat to turn over and spill her cargo right in Brooklyn at a dock.

Q. That might be from having too high a center of gravity, that is understood. It might be from building the boat so tender——

A. She came down the Hudson on the Jersey side with all the boats and they put her in the dock and went to hoist the derrick aloft and the sling got away from them and over she went; and she come back again, she just turned over enough to dump all her lumber and come right back again.

Q. Evidently that boat wasn't leaking; did you examine it?

A. We examined it and found she was overloaded.

Q. But you couldn't pile this sort of a cargo which is under discussion here to such a height that you could raise the center of gravity so that she would turn over?

A. I think you could, your Honor; she is 28 to 30 feet, I don't know that boat, I should judge that.

Q. Coal at the normal is 40?

A. Soft coal, yes. Hard coal about 32. I might be mistaken in that.

Q. But it is a greater specific gravity than coal?

A. Yes. And there is more—I don't know that it is very much more than half rock.

Q. Well, it seems to me it is a curious thing. When that [fol. 148] was filled up to her maximum capacity would it be over the top?

A. With this concentrate, no, I think it would hardly come to the top of it.

Q. What do you call those things?

A. There, cargo aprons or bulkheads some call them, cargo bulkheads.

Q. And they are about 10 feet high?

A. About 10 feet.

By Mr. Eggleston:

Q. Captain, have you known of deck scows in the harbor loaded with chalk or ore having spilled their loads.

A. I don't remember any of them.

Q. You have testified to a great many broken beams and planks and so forth that you found on the No. 32; could you tell from your inspection of the scow whether the breaks you found were old or new breaks?

A. They were new breaks, they were from that damage.

Q. Did you find any old breaks on the scow?

A. Not in my recollection, it is not my report.

Q. Now, in inspecting the scow did you look over her caulking or did you see the caulking oakum in the seams?

A. We went carefully over the boat while she was in drydock and we couldn't find anything about that boat other than what was caused by the damage, why she should turn over.

Q. What was the condition of the oakum, the caulking that you found?

A. The only caulking that I could see in it, of course we tried around the corners and ends with a trier, but the only oakum I could see was where she was broken; we walked up on this boat while she was turned over, there were big sheaves of oakum hanging out of the broken seams.

[fol. 149] Q. In what condition was that?

A. That was in good condition.

Q. Did you say you tried out the oakum?

A. When we went around the boat we tried with a trier the various seams that were broken.

Q. And that was at the Jersey City dock, while the boat was in drydock?

A. Yes, sir.

By the Court:

Q. And you walked on her while she was upside down in the East River as she was hanging there? That is a picture of her, they tell me?

A. Yes. This is the side we walked up, on this side, not that side.

Q. And this was the bottom?

A. No, this was the bottom.

Q. This was the bottom where you walked?

A. This was the bottom, that was the top where she is hanging.

Q. This is the carfloat?

A. This is the edge of the boat.

Q. Is this the bottom or the side?

A. No; she wasn't quite in that position when I saw her; she was further over than that, she was hooked over.

Q. But she was on top of the carfloat when you saw her?

A. She was hooked onto the carfloat just like that—hooked on to the outward downstream corner of the carfloat.

Q. And if you walked up on her side——

A. I walked up on this side of the boat.

Q. Towards the ——

A. Towards the top of her.

Q. And found this oakum?

A. Well, in a number of places where the planks had been broken it started the oakum, and it naturally fell out.

[fol. 150] Q. And that oakum was in good condition?

A. That oakum was in good condition.

By Mr. Eggleston:

Q. I understood you to say when you examined the boat while she was in dryrock at Jersey City, you went around the boat and examined the caulking?

A. We were looking to see if there were any leaks.

Q. What did you do to examine the caulking?

A. We tried it with a trier I have, like an icepick.

Q. What condition did you find the caulking to be?

A. We couldn't find any condition that caused the leak other than these breaks, not only myself but others.

Q. Aside from these fresh breaks that have been referred to, what was the general condition of the 32?

A. She was in good condition.

Q. Now, assuming, Captain, that No. 32 had a load of ore aboard and spilled that load, turned over and struck a

pier and struck a carfloat, in your opinion would that be a competent producing cause of the damage that you found on the boat at the time of the survey?

A. It was.

The Court: It would be?

The Witness: It would be.

Mr. Eggleston: I offer the survey in evidence.

It is received and marked Cullen Exhibit A of this date.

[fol. 151] Cross-examined by Mr. Martin:

Q. Mr. Gardner, the proper way to load this boat would be to dump the first bucket in the corner of the boat, wouldn't it?

A. In my opinion, yes, the center line; I wouldn't say exactly the center of the boat.

Q. I don't mean the middle between bow and stern; I mean the center line of the boat?

A. Yes.

Q. And then put a load on either side of that?

A. Yes.

Q. And then do the same thing over again?

A. Yes.

Q. And do the same thing again?

A. Yes.

The Court: You make a series of triple piles so to speak.

Q. And if you had a bucket with a latch on and a man to loosen the latch the bucket would be down close to the deck for that purpose, wouldn't it?

A. Where the man could reach it, within a few feet.

Q. And that would be a very careful way of loading?

A. It would.

Q. You would have no complaint on that, would you?

A. No, I would not.

Mr. Martin: I expect to prove that that was the way this boat was loaded.

Q. This material isn't piled high, is it, to make a full cargo?

Objected to.

Question withdrawn.

The Witness: It isn't carried for cubic capacity; it is dead weight cargo.

[fol. 152] Q. It wouldn't go up to the top of the bulkheads, would it? A. In my opinion it wouldn't.

Q. How far do you think it would come, to the top of the bulkhead?

Mr. Eggleston: Objected to.

The Court: We are talking about this kind of cargo and the witness seems to know about it; all we want for a background is how this cargo can be loaded on this sort of a boat without turning over. If she is in practically good condition previously you couldn't put her 20 feet high for she would tip; you might put it 10.

The Witness: You might put it 10 feet here, but put it as they do trap rock or stone, it makes a difference whether you come up this shape or in this.

Q. How far a boat will tilt depends on how much water there is in it?

A. Yes, a boat with water in it——

Q. And if there is water in her she is what we call cranky?

A. Yes, but some boats are cranky without water.

Q. Now, the natural thing to do with a boat of that kind would be to give her a slight list toward her pump?

A. Not a list, a tip.

Q. A tip or whatever you call it towards her pump?

A. Yes, a little; as a general thing they do, with grain boats, not with these cargoes.

Q. But they do with any boat?

A. If she is dead level they will get it out.

Q. Suppost this boat has 2 inches of water all over her and she goes and meets a steamer coming along, she will begin to roll?

A. Yes.

[fol. 153] Q. And there is much more danger of that water rolling in meeting swells; if she is so stowed that they can pump it out?

A. That is a set for pumping purposes, an inch list will do that.

Q. And it is proper to give her a list of 1 or 2 inches to her pump?

A. If I had any doubt about her leaking I would.

By the Court:

Q. Would an inch or two make her liable to tip?

A. Hardly, your Honor; it would be only 2 inches of water you would be loading the boat too near the danger line; 2 inches of water is very little.

By Mr. Martin:

Q. Well, when you draw down to the corner by a 2-inch list with 2 inches of water how much——

A. Well, there is 63 pounds to the cubic foot, about a ten and a half.

Q. So that you think it would be ten and a half to 2 inches?

A. It would be equal to ten and a half of cargo on deck; not ten and a half down below.

Q. When you speak of the good condition of this boat, you examined her to find old breaks, did you?

A. Yes, I was there to find anything I could which made that boat go over.

Q. And you don't know how the caulking was in any of the seams, do you?

A. I didn't go over every inch of the seams but I went to the place where the boats give out first, the corner chime seams and scarves and the butts.

Q. But they were all started?

A. No, on this side where she broke, on the other they might be dry, but not enough to leak.

[fol. 154] Q. You say the butts and scarves on the port side were not started?

A. Some of them were up here and we tried around and didn't find any.

Q. And it was up on top of the seams where the boat is let lie that leaking starts in most boats?

A. Not always; if they are not loaded properly, if they are loaded too heavily in the middle, if you put the cargo here she will open in the water and if you take the cargo out she will go back again.

Q. Now, as I understand you, she might be too heavily loaded in the side or in the middle?

A. No; speaking generally——

Q. This boat wasn't hogged, was she?

The Court: He is just explaining things.

The Witness: If she is loaded badly in the center first, sometimes we load them heavier on the sides and squeeze the bottom together.

Q. To test caulking what do you do?

A. To test caulking?

Q. Yes.

A. I try it with my trying iron.

Q. What is that?

A. Something like an ice pick but a little flatter; we shove it along the oakum, not into the oakum, to see if the oakum is tight in the seams.

Q. That is the only way you can tell?

A. That's right. I have done lots of caulking.

Q. Oh, I understand that. I have no argument with you. Did you get bids on this work?

A. Yes.

Q. How much was the coat of repair?

A. I don't know; they took the survey away from me.

The Court: Let him have it back again. Can't we agree on what it was. Is it on this?

[fol. 155] The Witness: No, it isn't in here but I have a copy somewhere, where I had it on—here it is, Jersey City Drydock 8950, 22 days. James Tregarthen, 9-5-10 25 days. Crandall Drydock 9480, 26——

The Court: You gave it to the Jersey City Drydock, did you?

Mr. Martin: We didn't give it to anybody.

The Court: What did they do?

Mr. Martin: Afterwards they used her for a float.

Q. Now, Mr. Gardner, how much did a new boat of this size cost in 1925?

A. A new boat?

Q. A boat; I think she is described as 112 by 33 by 12?

A. Well, I wouldn't dare to make an estimate on that boat without loking at my records.

Q. You know the cost of a scow at that time?

A. I am getting mixed up on the year.

Q. Well, I will make a rough figure——

A. Wait a minute; three years ago you could build a scow larger than her for about $17,500.

Q. They ran from $16,000 to $17,500?

A. Yes.

Q. And this boat could have been repaired for $8,950, to make the repairs in this survey?

A. She wasn't a new boat.

Q. I know she wasn't a new boat.

By the Court:

Q. Was she worth repairing?

A. No, sir.

Q. She was so much jarred that it wasn't worth while?

A. No, and in my opinion, by the look of her she was twelve or fifteen years old, anyway.

[fol. 156] By Mr. Martin:

Q. How much was she worth in her damaged condition?

A. No commercial value.

Q. How much did your put on her?

A. I didn't put any on.

Q. It was said to be $250?

A. Well, somebody might have wanted her to use as a float or as a commercial boat to repair again; I should say she was of little or no value.

The Court: I am not interested in the value.

Q. How was this boat turned over; was a wrecking company used?

A. I recommended the boat be lifted off the carfloat, turned back and taken to a drydock for full survey. That was my recommendation. I also surveyed the carfloat.

Q. Now, it was nothing unusual in taking cargo off of a deck scow for her to take a considerable list to one side when the cargo is removed from the opposite side, is it?

A. Brick?

Q. Anything?

A. Not always.

Q. I am not speaking of not always, I am speaking of that condition existing?

A. Not always; if they have a pull wheel bucket they might leave a corner here and a corner here. It was wrong for it will twist the boat.

Q. You have often seen scows being unloaded?

A. With bucket cargoes?

Q. With any?

A. Other cargoes we don't have them and give them a list.

Q. What kind of cargoes have you seen being removed where you had lists?

A. With bucket stuff, where they used a pull wheel.

[fol. 157] Q. And how much of a list have you seen?

A. Little or no list, but more often they will have it in the corner like this——

Q. I am not talking of twisting a boat, Mr. Gardner; I am asking a plain question; you have always seen boats list when the cargo is being taken off until they got the cargo off the opposite side?

A. Well, when they are half or two-thirds discharged they may have a little list on them.

Q. When you take cargo off you have a list right away?

A. They give it a little list.

By the Court:

Q. Why?

A. To keep it from swinging around. You take a little brick off one side and wind them around and take the brick off the other side.

Q. You wouldn't consider a 15-degree list in a boat like that of any danger?

A. Yes.

Q. How much list do you think without water in the boat would have any effect?

A. A point, that would be 11 degrees.

Q. That is without water?

A. Yes.

Q. And if she had water in her she couldn't take that much of a list?

A. That is near the danger line I am speaking of now.

Q. Now, after all your examination of this boat you couldn't tell the cause of her overturning, could you?

A. No, I couldn't.

Q. And none of the surveyors could?

A. No, we couldn't find out why she turned over.

Q. The seams naturally were opened up when you got there?

A. Yes, from the turning over.

Q. You don't know what opened them up; some of them may have been opened up from turning over?

[fol. 158] A. The boat had struck the piling, had turned over on the float and had been lifted off the float and turned over by the salvage people.

Q. Well, what seams were opened when she turned over you don't know?

A. All the seams that were in that boat that was damaged was done by the fact of her turning over and striking the float and the boat also turning back.

Q. That is your opinion?

A. But they never showed up.

Q. They were all open when you examined them?

A. They weren't all opened.

Q. But many of them were opened?

A. Yes, where she was broken.

Q. And on the opposite side from the strain?

A. Yes.

The Court: The strain was all over her.

Q. Whether she was opened before that or not you nor nobody else could see unless they saw the seams?

A. If you take the caulking from one side and find it good there must be the same oakum continuing along on it. They are edgebolted and between the edgebolting they have 5 inches of caulking and on the other they have only 2½ or 3. The edgebolting goes down through the 6-inch plank and there isn't as much caulking on that.

A short recess.

After the recess.

[fol. 159] FRANK GARDNER resumes the stand:

By Mr. Martin:

Q. Mr. Gardner, I understood you to say there was two inches of water over the bottom of this boat, or thereabouts; that would amount to about a ton and a half of water?

A. That was only my guess at it.

Q. Would you be surprised to know that it would be about 16 tons?

A. I didn't imagine it would be as much as that.

Q. That would have a pretty serious effect on a boat?

A. 16 tons?

Q. Yes.

A. It is not light on the top. If she was upright 2 inches wouldn't be so much.

Q. We are speaking of a list or what you call a little tip?

A. 2 inches of water, the pump wouldn't suck it.

Q. But that meant 16 tons of water down below?

A. You said so; I didn't say so.

Q. If she had 16 tons of water down below, that was quite a lot of water?

A. Yes.

Q. Well, take 100 by 26——

The Court: You calculate that out; I think it sounds extraordinary. Don't let us waste time with him. The witness doesn't believe it and I don't believe it—I may have to believe it.

The Witness: 2 inches of water, the pumps wouldn't suck.

Mr. Martin: We are speaking now with the tip that you speak of.

[fol. 160] Q. This caulking iron that you use; will you say what that is?

A. I didn't say a caulking iron; I user a trier; it is like an ice pick.

Cross-examined by Mr. Middleton:

Q. How hard do you jab this trier in the seams when you test the oakum?

A. Well, I drive it as hard as I can for my hand to try it. You wouldn't care to have me try it on you that hard.

Q. I would like you to tell us something about the stability of the scow. Isn't it so that the scow being off here on the bottom and with a heavy cargo on the deck has the center of gravity pretty high?

A. Yes.

Q. And it is apt to list and spill without very much list; I mean it doesn't take much list to make the scow careen and dump her cargo?

A. You mean she is tender, she is cranky; it doesn't take much to make her take a list?

Q. Yes.

A. No. The more you put on the deck the more she will list.

By the Court:

Q. That is the result of the water coming upwards as she gets deeper and deeper and raising the center of gravity?

A. Yes, sir.

By Mr. Martin:

Q. You said a scow with less draft would be better for that business?

A. I said a scow with 12-foot sides wouldn't be so cranky as a 14-foot scow.

Q. You spoke of McAllister's boats?

A. They are shallower boats and wider, therefore they [fol. 161] have more stability, the center of gravity doesn't go up on them so fast as you load them.

Q. So you consider those boats cranky boats?

A. No, I consider them a good average deck scow.

By Mr. Shortridge:

Q. What is the capacity of this scow; is it 700 or 800 tons?

A. I never worked her out; I should judge from her dimensions or 800 tons. I don't want to say that for I haven't worked it out.

Q. It would be 33?

A. 7 by 33, and the average length of her would only be 100 feet. That would make say about 95.

Q. What you are giving me there is what would be her displacement?

A. Yes; multiply that by 63 pounds——

Q. 64 pounds for salt water?

A. Well, some salt water, but 63 in New York harbor.

Q. And you have to subtract the actual weight of the scow?

A. No, you do not for you have taken off your draft; then you divide that by 2,000 tons and it would give you the length——

Q. 95 times 33 times 7/6?

A. I wouldn't say 7/6: I don't know what she drew light.

Q. The testimony seems to be that her deck was 3½ feet above the water?

Mr. Martin: Light she drew 2 feet.

Q. That would give 6½ feet she would be immersed by putting a load on?

A. Well, taking immersion——

Q. Multiply by 63 and divide by 2,000?

A. Yes, I see; I would use another method and multiply by 32.

[fol. 162] By the Court:

Q. What would you get as her capacity?

A. About 800, but I may be wrong.

Q. You would say 700 to 800 tons?

A. Yes.

By Mr. Shortridge:

Q. As this scow reaches more nearly the completion of her loading does it take a larger or smaller quantity of cargo away from the center line to affect the list?

A. What is that?

Q. When you take a larger or smaller amount of cargo away from the center of the ship that will give a list, if your scow is completely loaded——

A. It would take less cargo on top—flat bottom boats are very safe when they are light.

Q. When you are very nearly completely loaded a small quantity of cargo out from the scow will produce a greater list than earlier in the loading, is that right?

A. Yes.

Q. Now, going back to the 2 inches of water, 2 inches evenly distributed over the bottom will produce in tons something like—a boat 90 feet long and about 30 feet wide by the 2 inches, which is a sixth of a foot, is 63 divided by 2000?

A. But remember you have to take out all these stringers, all the keelsons——

By the Court:

Q. I don't think 2 inches could roll around very much?

A. It couldn't. These stringers take up nearly as much room as the water does; you have to split them to make it right.

[fol. 163] By Mr. Shortridge:

Q. You say you don't get the uniform 2 inches until you are above the keelsons?

A. No.

By the Court:

Q. How big are the keensons?

A. 12 inches; 2 inches of water over that boat, you would have to take the stringers out and if it went higher than that you would have to take the floor frames out and if it went higher than that you would have to take the fore and afte bulkhead out.

Q. Is there any connection between these?

A. Some have a little side board——

Mr. Martin: He testified that the water could flow from one to the other freely.

By Mr. Eggleston:

Q. Mr. Gardner, what is the height of the stringers above the bottom planks?

A. Of the fore and aft stringers?

Q. Of the fore and aft stringers?

A. 12 inches.

By the Court:

Q. Do you mean keelsons?

A. Yes.

By Mr. Eggleston:

Q. Are there scuppers in the keelsons?

A. Usually.

The Court: They did testify there were some sort of scuppers in the fore and aft bulkheads.

[fol. 164] Q. Are there scuppers in the keelsons?

A. Yes, there are scuppers in the keelsons next the plank.

Q. How many keelsons did this boat have—how many does the ordinary boat of that size have?

A. Seven; I think this boat in the bottom had more.

Q. And what are the sizes?

A. They would be 8 by 10 by 12. I am not sure about that size.

Q. What would be the width between?
A. 8 inches wide by 12 feet.
Q. What would be the size of the floor frames?
A. The cross floor frames?
Q. Yes.
A. Not less than 12 by 12.
Q. And how many floor frames would there be in a boat of this size?
A. With 5 feet between centers—I don't know whether she is built 5 feet or 8 feet or what, between centers.
Q. How many would you expect to find?
A. Divide 5 into 100—there would be 12, anyway.

The Court: There wouldn't be 2 inches of water at large to create impact against the side; it would be broken up so that you wouldn't get the same effect as if you had a big empty still pool or something.

Q. You have seen the pumps in a great many deck scows, haven't you?
A. Yes.
Q. How are the pumps set in ordinary deck scows?
A. Less than 2 inches.
Q. What do you mean by that?
A. From the bottom. If they put them nearer the bottom than that they would draw it in from the space between the frames; if you have them too close if you pump too fast it sucks at once.
Q. If you have a pump 2 inches from the bottom and the boat is on an even keel how much water must the scow have [fol. 165] in in order to operate the pump?
A. 2½ or 3 inches.

By the Court:

Q. You never can get 2 inches out unless she is tipped in some special way?
A. No, unless, as I testified, you tip them a little bit.

Mr. Martin: That is the way they load them, your Honor.

By Mr. Eggleston:

Q. You were asked if water in the hold of a scow would affect the list of the scow?
A. I would want to know how much. With 2 inches in the bottom of the scow and she was dead upright you wouldn't know it was there.

Q. Would the trim of the cargo make any difference?
A. If you give her a little list you would know there was water there.

By the Court:

Q. Even with 2 inches?
A. I hardly think with 2 inches; it is too small.

By Mr. Eggleston:

Q. Would the trim of the cargo affect the list of a boat with no water in her?
A. Yes.
Q. And the kind and weight of the cargo?
A. Yes, the more bulky the cargo, the higher it went, it would all affect her.
Q. Those are all important factors. Now, when you examined the caulking of this boat over at Hoboken, did [fols. 166-171] Mr. Bagger go around with you?
A. He did.
Q. Was he with you when you used the trying iron on the caulking?
A. He was.
Q. And whom did he represent?

Mr. Middleton: I object.
The Court: It doesn't make any difference; it doesn't affect me at all.

A. I am not sure.

[fol. 172] Testimony for the Hedger Company

Stanley W. Pierce, being duly sworn and examined as a witness for the Hedger Company, testifies:

Direct examination.

By Mr. Middleton:

Q. Are you associated with the W. E. Hedger Company, Inc?
A. Yes.
Q. In what capacity?
A. Vice president.

Q. Were you so associated with Hedger in August, 1925?
A. I was.
Q. Do you recall the steamer Berk arriving in New York in that month?
A. I do.
Q. Was Hedger requested by the Grasselli Chemical Company to transport the cargo on the Berk from the New York pier to Grasselli, New Jersey?
A. Yes.
Q. Were you in charge of that work for Hedger?
A. I was.
Q. In connection with that work did you charter any scows?
A. I did.
Q. Among others you chartered the scow Cullen 32?
A. Yes.
Q. How was that work to be handled, the work of getting the cargo from Roosevelt Street where the cargo was, to Grasselli?
A. We were asked by Grasselli to arrange for the transportation, to arrange for the stevedoring and to arrange for the towing to their plant.
Q. And did you employ the Port Fueling Corporation to do the moving?
A. Yes.
Q. As I understand the way you handle it, you had the scows brought to Roosevelt Street?
A. That's right.
[fol. 173] Q. And the Port Fueling Company loaded the scows?
A. Yes, sir.
Q. And the Port Fueling Company would then report to you that the scows were loaded, is that right?
A. That's right.
Q. And you would then communicate with one of your tugs to pick up the scow and take it to Grasselli?
A. That's right.
Q. When the scow Cullen 32 was in the slip at Roosevelt Street did you or anyone connected with Hedger have anything at all to do with the scow?
A. Other than landing the boat there, when she was landed there——
Q. You hadn't anything to do with the scow?
A. No.

Q. Did you entrust that scow to the care of anyone other than the Port Fueling Corporation?

Mr. Martin: I object to that.

The Court: He engaged the scows and became a demise charterer and then he had them sent around there in some way to load; don't try to redefine the relationship but tell me what was done; I think that is what it really is boiled down to—he was a demise charterer.

Q. What, if anything, under your agreement with the Port Fueling Corporation was the Port Fueling Corporation to do in connection with these scows?

The Court: Was it in writing?

Q. Was it oral or in writing?

A. It was oral. We arranged with them to provide a [fol. 174] berth for the steamer and we would put the scows alongside and they would load them and notify us when they were ready to tow and when they wanted more scows we would take the loaded ones away and put light ones there.

By the Court:

Q. This is what it amounts to, that the Grasselli Corporation, having a cargo that they wanted taken to New Jersey, asked you to get some marine equipment and to unload it and bring it over to them and you looked around and you took this Port Fueling Company or whatever it is called, to be the stevedores and you arranged for some scows to go over there and you arranged a dock for the vessel to lie at?

A. They did.

Q. Who is they?

A. The Port Fueling.

Q. And she went there and between you and the Port Fueling Corporation who were sub-contractors to you, you arranged to have these boats come over and be filled from time to time, didn't you?

A. Yes, sir.

By Mr. Middleton:

Q. Did anyone acting on Hedger's behalf ever inspect the scow No. 32 before she went under charter to you?

A. No.

Q. And when you chartered this scow from Cullen did you state the purpose for which she was to be used?

A. I did.

[fol. 175] Cross-examined by Mr. Eggleston:

Q. Mr. Pierce, there has been a libel filed by W. E. Hedger & Company, as bailee of the cargo on the 32; you filed a libel as bailee of the cargo?

A. I believe we did.

Q. And you know of the 32 throwing the cargo?

A. Yes.

Q. Who did you have examine the Cullen No. 32 after she threw the load?

A. I don't really know.

Q. You had someone?

A. We had no direct representative.

Q. Well, you had somebody go over and inspect and examine the scow 32 after she spilled her load, didn't you?

A. I don't believe so.

Q. You don't know whether you had anyone go over and examine her or not?

A. I have no record of having anybody go.

Q. You won't say you didn't have anybody examine the scow on your behalf, will you?

A. So far as I know, there was nobody.

Mr. Middleton: I am willing to admit that Captain Bagger examined this scow on behalf of the cargo underwriters.

Cross-examined by Mr. Martin:

Q. How much cargo have you claimed as being lost?

A. About 375 gross tons.

Q. That is all you claim for as being lost by the overturn?

Objected to.

Q. All you claim is for the material you lost by the overturning of this boat, is it not?

[fol. 176] The Court: I will let him answer.

Q. How much are you claiming is lost?

The Court: It must show in the libel.

Mr. Martin: I don't know whether the libel states, your Honor.

A. About 375 gross tons, as I recall.

Q. And how many scows were loaded by the Port Fueling with this material at that time?

A. About six.

Q. And there was a Bouker and a Moran, two Cullens, including the one that turned over, and what about the other two?

A. There was the Willie and Annie we chartered from Harms, the Moran 48, the Maple and the 66-11.

Q. 66-11 is a Barber scow?

A. Yes. There were six in all.

Q. And they all carried their cargoes except the 32?

A. That's right.

Q. What kind of ore was this?

A. Barytes.

Q. Now, there is another similar ore called pyrites?

A. Yes.

Q. That is much heavier?

A. Personally, I don't know.

Q. It is a livelier cargo that will shift more easily, pyrites, than barytes?

A. I am not competent to say.

Q. The Port Fueling has handled a great deal of pyrites for you?

A. Yes.

Q. Loaded a number of deck scows?

A. Yes, sir.

Q. They would run up in the hundreds, wouldn't they?

A. They might.

Q. And they have loaded sulphur?

A. Yes.

[fol. 177] Q. And chalk, too?

A. Not for us.

Q. They have loaded probably in a year's time three or four hundred scows, haven't they?

A. Well, not scows, no.

Q. Well, boats of all descriptions?

A. Yes.

Q. And a great many deck scows?

A. Yes.

Q. This pyrites and barytes came on deck scows, is that correct, and sulphur?

A. Sulphur on deep boats.

Q. I don't know if I understood you correctly, Mr. Pierce. You don't say that Port Fueling hired the berth for the steamer?

A. That is my record.

Q. Now, you know nothing about the No. 32 at all, you relied on Cullen to send you a proper barge.

Objected to.

Cross examined.

By Mr. Shortridge:

Q. Did you have anyone for the Cullen people do anything to ascertain the condition of the 32 after she went under charter?

A. No, sir.

Q. There was nothing done by anyone from the Hodger Company to determine her condition or look towards her upkeep or anything while she was under charter?

A. No.

The Court: She was there only two days.

By Mr. Eggleston:

Q. You don't know of your own knowledge how much cargo was loaded on this scow, do you?

A. Not from seeing it or weighing it.

[fols. 178-317] Q. You don't know of your own knowledge, do you?

A. No.

Adjourned until 10.30 a. m. November 17, 1930.

[fol. 318] In United States District Court, Southern District of New York

Admiralty 98 138

In the Matter of the Petition of the Cullen Fuel Company, Inc., as Owner of the Deck Scow "Cullen No. 32"

Admiralty 91 392

Long Island Railroad Company; Libellant,

vs.

Cullen Fuel Company, Inc., Respondent; W. E. Heidker & Company, Inc., and Port Fuelind Corporation, Impleaded

Admiralty 93 381

Cullen Fuel Company, Inc., as Owner of Deck Scow "Cullen No. 32,"

vs.

W. E. Heidker & Company, Inc., Port Fuelind Corporation

Admiralty 87 186

W. E. Heidker & Company, Inc., as Bailee of Cargo on the "Cullen No. 32,"

vs.

Deck Scow "Cullen No. 32," Cullen Fuel Company, Inc., and Port Fuelind Corporation

On petition for limitation of liability by the Cullen Fuel Company, Inc., in respect of the capsizing of the scow Cullen No. 32, with a load of copper barytes, on August 13, 1925, in a slip between a pier under the Brooklyn Bridge, East River, and Pier 22 just north of it, the consequent loss of cargo and damage to Pier 22 and Carfloat No. 10, belonging to the Long Island Railroad Company.

[fol. 319] Messrs. Macklin, Brown, Lenahan & Speer, by J. D. Eggleston, Esq., of counsel, for the Cullen Fuel Company, Inc.

Messrs. Burlingham, Veeder, Fearey, Clark & Hupper, by B. F. Shortridge, Esq., of counsel, for the Long Island Railroad Company.

Messrs. Single & Single, by T. N. Middleton, Esq., of counsel, for W. E. Hedger & Company, Inc., demise charterer of scow.

Messrs. Foley & Martin, by J. A. Martin, Esq., of counsel, for Port Fueling Company, stevedores engaged in unloading scow.

OPINION

WOOLSEY, J. (orally):

I hold the Cullen Fuel Company, Inc., liable for the accident hereinafter described; I deny its petition to limit its liability, and I hold that the claimants in that petition are entitled to their several bills of costs.

I dismiss the libel as against W. E. Hedger & Company, Inc., by the Cullen Fuel Company, Inc., with costs.

I dismiss the libel of W. E. Hedger & Company, Inc., as against the Port Fueling Corporation, with costs.

I dismiss the libel of the Long Island Railroad Company as against W. E. Hedger & Company, Inc., and Port Fueling Corporation, respondents impleaded, and the petition of Cullen Fuel Company, Inc., against them with costs to such impleaded respondents as against the Cullen Fuel Com-[fol. 320] pany, Inc., on whose petition they are made parties to this suit.

1. The parties concerned in this riverside drama are as follows:

The Cullen Fuel Company, Inc., was the owner of the Scow Cullen No. 32, whose capsizing caused the damage out of which these several suits have arisen.

W. E. Hedger & Company, Inc., was the charterer of the Scow No. 32 under the familiar harbor demise charter and had been engaged by the Grasselli Chemical Company to unload a cargo of copper barytes from the steamship Berk for which the berth on the northerly side of the Brooklyn Bridge pier had been engaged, and to transport that cargo to the Grasselli plant in New Jersey.

The Long Island Railroad Company was the lessee of Pier 22, next above the Brooklyn Bridge pier, and was the

owner of the Carfloat No. 10, which was lying at Pier 22, when the accident hereinafter described happened.

The Port Fueling Corporation is a corporation engaged hereabouts in loading and unloading cargoes and fuel and on the occasion in question, was acting as contracting stevedores engaged by Hedger & Company, the charterer of the Cullen No. 32 to unload the Berk.

II. The precedural pattern of this case which is somewhat complicated should, perhaps, have a word of mention here.

The Cullen Fuel Company, Inc., was sued by the Long Island Railroad Company in the Supreme Court of New York State for damage to its leased pier, Pier 22, East River.

The Long Island Railroad Company also sued the Cullen Fuel Company, Inc., which impleaded W. E. Hedger & Com-[fol. 321] pany, Inc., and the Port Fueling Corporation, in this Court for damage to its Carfloat No. 10. This carfloat was lying overlapping the end of Pier 22, which is somewhat shorter than the pier under the Brooklyn Bridge at which the steamship Berk was lying.

W. E. Hedger & Company, Inc., was demise charterer of the scow Cullen No. 32 of the Cullen Fuel Company, Inc., and as such was bailee of the cargo on board the scow. It has brought suit in this Court against the Scow Cullen No. 32, the Cullen Fuel Company, Inc., and the Port Fueling Corporation, seeking to cast the responsibility for the loss of the cargo of the No. 32 on the scow or on one of those respondents.

Across this network of litigation the limitation proceeding filed by the Cullen Fuel Company, Inc., as owner of the scow Cullen No. 32, was drawn, with the result that all the proceedings in which the No. 32, or the Cullen Fuel Company, Inc., were sued, or were in the position of defendant or respondent, were stayed and all claims against them for this accident were drawn into the limitation case.

The Cullen Fuel Company, Inc., not content with defensive tactics only, however, has sued W. E. Hedger & Company, Inc., as demise charterer, for damage to the Scow No. 32, and W. E. Hedger & Company, Inc., not having been active in connection with the loading and management of the scow, brought in by petition the Port Fueling Corporation as a joint respondent.

Consequently, outside of the limitation proceeding, which is the dominant proceeding before me, there still remains [fol. 322] unstayed and to be dealt with independently the libel of the Cullen Fuel Company, Inc., against W. E. Hedger & Company, Inc., the Port Fueling Corporation, impleaded, and the suit by W. E. Hedger & Company, Inc., as bailee of the cargo in so far as the Port Fueling Corporation is the respondent, and the suit of the Long Island Railroad Company against the Cullen Fuel Company, Inc., in so far as the claims against W. E. Hedger & Company, Inc., and the Port Fueling Corporation are concerned.

Therefore the opinion which I am rendering herein deals not only with the liability of the Cullen Fuel Company, Inc., for the loss hereinafter described and with its right to limit its liability therefor, but also with its right to recover for damage to the Scow No. 32 against W. E. Hedger & Company, Inc., and the Port Fueling Corporation; with the right of W. E. Hedger & Company, Inc., to recover against the Port Fueling Corporation, and the right of the Long Island Railroad Company to recover against W. E. Hedger & Company, Inc., and the Port Fueling Corporation.

III. In any matters like this it has always seemed to me highly important that the locus in que should be as clearly described as may be, and consequently I have been at some pains to get into the record the dimensions of the various vessels concerned, and also the width of the slip and the length of the piers where they were lying.

The Cullen No. 32 was a deck scow of a length of 112 feet at her deck and 90 feet at her bottom, with a 33 feet beam and with 10-foot dept- of side. She had three bulkheads, which were not watertight, running fore and aft of her, dividing her interior into substantially three equal parts.

[fol. 323] The steamship Berk is agreed to have been 345 feet long and of 54 feet beam. She was lying bow in on the north side of the Brooklyn Bridge pier with her stern considerably in from the end of that pier, which is 487 feet long.

Pier No. 22 is irregularly shaped, its downstream side, which slants slightly up the river, is 243 feet long, and the upstream side, which is at right angles to the river, is 262 feet long.

Thus it will be seen that as Pier 22 is shorter than the Brooklyn Bridge pier, there is a comparatively wide stretch of water between the end of the Brooklyn Bridge pier and the end of Pier 25, which is the next pier above Pier 22.

The width between the river ends of the Brooklyn Bridge pier and Pier 25 is 262 feet, and the width of the slip between the Brooklyn Bridge pier and Pier 22 is 150 feet at the river end. Pier 25, though it may not be of any relevance whatever, is 527 feet long.

IV. On August 12, 1925, the Cullen No. 32 had been brought down to the slip between the Brooklyn Bridge Pier and Pier 22 and had on that day loaded a part cargo at the No. 2 hatch of the steamship Berk, which assumedly would be forward of the engine room.

The No. 32 had been loaded on August 12th by the United States Trucking Company Derrick No. 2, and the evidence is that she had been loaded on an even keel with her cargo fairly distributed.

On the day of accident, August 13th, the No. 32 had been moved to the No. 3 hatch of the Berk to be further loaded, and was there loaded during the morning by the Port Fueling Corporation's Crane No. 2.

[fol. 324] The loading began on the morning of the 13th at about 8 o'clock and continued until about a quarter of twelve, when, having been advised that a tug was coming with some empty scows and would remove the Cullen No. 32 with what cargo she then had on her, and the Cullen No. 36, which was practically a sister scow and had been more fully loaded than the No. 32, work on the No. 32 was suspended.

At that time the 130 feet of space between the Brooklyn Bridge pier and Pier 22 was occupied, commencing from the north side of the Brooklyn Bridge Pier, first by the steamship Berk, 54 feet wide, then by the Port Fueling Corporation's Crane No. 2, which was substantially 35 feet wide, and then by the Cullen No. 32, which was also 33 feet wide. Thus the slip, to a width of about 120 feet was occupied by these three vessels, leaving about 30 feet of open water between the outer down river corner of Pier 22 and the starboard side of the Cullen No. 32 which was lying bow in.

There was 15 feet more—the width of the outboard end of Pier 22—between the Cullen No. 32 and the Carfloat No. 10.

I think that this substantially describes the setting for what afterwards happened.

V. Now, in a case like this it seems to me that the trier of the facts has to endeavor to find what facts are either admitted or proved without challenge, and then, take those master facts as a kind of frame for the disputed facts. He must then see whether any contentions as to the disputed facts will fit in with the master facts. If any such contention does not fit the side so contending must clearly be wrong, because one of the most important elements in any case is the element of probability based on the master facts.

[fol. 325] Now, having seen all the witnesses, the master facts which seem to me sufficient to control my disposition of these cases without attempting perhaps to make an exhaustive list of them, are—

1. That at 11.45 a. m. on August 13, 1925, the loading of the Cullen No. 32 was stopped for reasons of convenience, when she had been loaded level and just after her master had asked to have a single bucketful of ore, which would weigh about two tons, put near her after starboard corner in order to give her a slight list of an inch or so towards the dump there situated.

2. That at that time she had on board about 375 tons of copper barytes stowed quite low with the longitudinal pack of the pile substantially in the centre of the scow.

3. That this load was substantially less than the load of her sister scow, No. 36, to which nothing happened, for No. 36 had on board between 500 and 550 tons of ore and was stowed at least two or three feet higher than the No. 32.

4. That copper barytes is a cargo with a somewhat steep angle of repose; which means, that when piled it does not slide easily. The reason for this is that it has some large lumps in it and is of rather a cohesive character.

5. That when the men engaged in the work of loading the scow No. 32 returned from their luncheon, they observed that she had a noticeable list, especially at her star-

board stern. Estimates of angles are always deceptive but the estimate is that this list must then have been at that point somewhere in the neighborhood of 15 degrees.

6. The list, thus observed, slowly increased. The estimates vary, but I think I am fair in stating that it took [fol. 326] from 15 to 20 minutes before the scow turned over. During that time the water on her starboard side was encroaching and creeping forward further and further on her starboard rail until that rail was under water to a point more than two-thirds or three-quarters of its length forward.

7. As a result the inclination of the No. 32's deck towards the water got greater and greater until it had reached an angle of about 40 degrees.

8. That then the starboard side of her cargo, which as above stated, had not been piled very high and had a steep angle of repose, had reached a position which was not far off from the perpendicular so far as the starboard slope of the pile was concerned, and that, then or about then, the cargo started to slide, with the result that it tore out a part of the scow's starboard rail, tipped her over, and went overboard itself.

9. That when she tipped the Scow No. 32 slid down into the water, which is thereabouts 32 feet deep, that she slid in towards the river and then shot back, jumping out of the water so that her bow, which had been swung toward Pier 22 by the result of the forces due to torsion of this irregular submersion, shot out of the water a considerable distance and landed upside down with her bow resting partly on the piles of the adjacent Pier 22 and partly on the Long Island Railroad Company's Carfloat No. 10 which lay, as above stated, on the northerly side of Pier 22 and extended beyond the end of that pier.

The No. 32's approximate position after the accident, as I find it, is shown by the red pencil dotted lines on the [fol. 327] Long Island Exhibit C, which I think shows the situation just after the accident with substantial accuracy. Although I am not sure that it is correct in putting the Moran No. 48 near the stern of the steamship Berk, that, if an error, is immaterial.

I find, therefore, that the foregoing is the story of the accident in so far as we need it for dealing with these cases.

VI. To my mind this story points one way only, that is to the fact that either there was water—unsuspected either by the Port Fueling Corporation or by Hedger & Company—in the scow when she was delivered to be loaded alongside the Berk, or that a leak existed in her starboard after corner or near it either at her stern or her side which had not been discoveed by the casual inspection made by her owners when she was delivered under the charter and did not become operative until her submersion had gone further than it went by the partial loading of the previous day.

In any event it seems to me that after she had reached a point of submersion with 375 tons of cargo on board, either due to her instability owing to the fact that she had water already in her or else to a leak which developed in her starboard after corner or thereabouts, as above suggested, she began slowly to list in the direction of her starboard corner.

The comparative sedateness of her gradual starboard sternwise submersion could be explained in my opinion by either one of the two alternatives I have suggested.

That she was improperly loaded would be the only other explanation of the accident.

[fol. 328] Having heard all the witnesses I am satisfied that the Cullen Fuel Company, Inc., has not made out that her cargo was improperly put on her. It seems to me that if the capsizing had been due to having her cargo improperly stowed, it would have been accompanied by entirely different phenomena to those observed. If it had been due to that cause I doubt very much whether the scow would have shot across the intervening open water to the Long Island pier in the way it did, and have struck the railroad float and the pier in the way in which it struck them.

What I have said means, that the claimants in the limitation of liability case have made out a case of liability on the part of the Cullen Fuel Company, Inc.; that the Port Fueling Corporation and W. E. Hedger & Company, Inc., are not liable to the Cullen Fuel Company, Inc., for damage to the scow, or to the Long Island Railroad Company for the damage it suffered; and that the Port Fueling Corporation is not liable to W. E. Hedger & Company, Inc., for the loss of the cargo.

VII. The next point with which I must deal is the right of the Cullen Fuel Company, Inc., to limit the liability so found against it.

I think such inspection of the Cullen No. 32 as was made before she was put on the charter and was lying light, drawing perhaps 18 inches to 2 foot of water, is not sufficient to satisfy the requirements of the situation.

It does not appear when she had been last caulked, the history of the scow was not shown with the frankness and in the detail that would be necessary to create a feeling of confidence in it in my mind.

[fol. 329] The records of this particular scow perhaps may have been lost as is claimed during the moving of her owner from one office to another, but her owner's officers know very well where all her repairs had been made and they did not call anyone from the repair yards to testify in regard to her.

Apparently a report by the master of the scow of a leak found was the only basis of or the reason for any examination other than walking around inside the scow when she was light to see whether there was any leak in her bottom and whether her beams were intact.

In other words, the Cullen Fuel Company, Inc., was indulging in a precedure which may perhaps be conveniently called a hearsay inspection.

Captain Gardner, a surveyor, examined the scow whilst she was practcially in the position in which she lay just after the accident occurred, and also saw her in drydock and there made an ex post facto examination. The fact that he found good oakum in some started seams does not cover, of course, with any particularity the place where I have found that the leak must have developed,—if indeed any examination after the scow was such a mangled wreck could be deemed to have established her seaworthiness in any regard when she went out on that charter. Certainly it could not have shown proper maintenance inspection by or in behalf of her owner.

The owner of the scow was here in port; the possibility of frequent observation of the scow by it is shown. The fact is that the scow was almost continually available for examination. In such a situation I think that her owners cannot be deemed entitled to have maintained the burden

[fol. 330] of proof to limit its liability on the facts as shown here.

The cause of the damage I have found to have been unseaworthiness due to a leak which the owner ought to have discovered and would have discovered if it had made a proper inspection. Cf. In re Eastern Transportation Co., 37 Fed. (2d) 363-365; Sanberg v. Wright & Cobb Lighterage Co., 171 Fed. 449, 455.

We have thus the privity of the owner of the Cullen No. 32 with the cause of the disaster,—the casual connection between the damage and the owner's personal fault which I think is necessary to preclude limitation of liability. Cf. El Sol and The Sac City (decided November 3, 1930); The Thessaloniki, 267 Fed. 67, 70 (C. C. A. 2).

VIII. As to the findings of fact and conclusions of law in this case, I refer counsel to my decision in El Sol and The Sac City (November 3, 1930, not yet reported), and to the order entered in those cases on November 29, 1930, for my views as to the method of dealing with the requirements of the new Supreme Court Rule 46½ and the practice I purpose following if parties are unable to agree on findings of fact in accordance with any opinion which I render, or are unable to submit to me findings which are satisfactory to me.

The matter of the findings of fact and conclusions of law must be finally disposed of on or before Wednesday, December 3, 1930.

IX. When the findings of fact and conclusions of law are disposed of, appropriate decrees will have to be entered in pursuance of the foregoing opinion.

[fol. 331] These will be as follows:

1. There will be interlocutory decree denying to the Cullen Fuel Company, Inc., any limitation of liability, providing for costs in favor of the claimants and providing for a reference to a Commissioner to assess the damages as against the Cullen Fuel Company, Inc., and also providing, of course, for the continuance of the injunctions against proceeding elsewhere than in the limitation petition.

2. There will also be a final decree dismissing the libel of the Cullen Fuel Company, Inc., against W. E. Hedger & Company, Inc., the Port Fueling Corporation impleaded,

with costs to each respondent as against the Cullen Fuel Company, Inc.

3. There will be a final decree dismissing the libel of W. E. Hedger & Company, Inc., as against the Port Fueling Corporation, with costs. This libel is, of course, stayed as against the Cullen Fuel Company, Inc.

The libel of the Long Island Railroad Company is also stayed as against the Cullen Fuel Company, Inc., and it must seek its damages in the limitation proceeding. Its libel in so far as the impleaded respondents are concerned, that is, W. E. Hedger & Company, Inc., and Port Fueling Corporation, is dismissed with costs to these respondents, recoverable in the first instance against the Cullen Fuel Company, Inc., the petitioner which impleaded them, and secondarily only against the libelant.

The decrees may be settled on two days' notice.

November 18, 1930.

, United States District Judge.

[fol. 332] In United States District Court

[Title omitted]

Order as to Findings and Conclusions

The proctors for the parties in the above entitled suits being unable to agree on any findings of fact and conclusions of law in these causes,

Now, therefore, I do hereby order

1. That the opinion heretofore filed on November 18, 1930, stand as the findings of fact and conclusions of law in these [fol. 333] cases and be deemed to constitute the final decision thereof; and

2. That decrees in accordance with said opinion be served within ten days of the service of the entry of this order on proctors for the parties hereto.

Dated New York City, Jan. 3, 1931.

Woolsey, U. S. District Judge.

[fol. 334] IN UNITED STATES DISTRICT COURT

In the Matter of the Petition of CULLEN FUEL COMPANY, as Owner of the Deck Scow "Cullen No. 32," for limitation of Liability

INTERLOCUTORY DECREE Jan. 20, 1931

A libel and petition having been filed herein by Cullen Fuel Company, under the provisions of Secs. 4283 to 4285 of the Revised Statutes of the United States, and the several acts and statutes amendatory thereof and supplementary thereto, for the limitation of its liabilities for loss, destruction, damage and injury, occasioned by or resulting from, or in connection with the capsizing of the scow Cullen No. 32 on or about August 13th, 1925; and

The said Cullen Fuel Company having, pursuant to order of this Court, filed herein a stipulation for value of the said scow Cullen No. 32, in the sum of $250 for the benefit of all persons awarded damages by reason of said capsizing; and [fol. 335] This Court having issued a monition against all persons claiming damages for any loss, destruction, damage, or injury occasioned by said capsizing, requiring such persons to appear before this Court and make due proof of their respective claims before Henry E. Mattison, Esquire, a Commissioner of this Court, on or before May 1st, 1928; and

Public notice of said monition having been duly given as required by law and the practice of this Court, and said Commissioner having duly made and filed his report herein bearing date of May 1, 1928, wherein and whereby it appears that certain claims there enumerated, and no others, have been presented pursuant to said monition; and

The matter having come on to be heard by this Court, upon the petition and answers thereto of W. E. Hedger Company, Inc., and Long Island Railroad Company, and having been argued and submitted by Messrs. Macklin, Brown, Lenahan & Speer, (J. D. Eggleston, Esq., for the petitioner, Messrs. Single and Single, (Thomas H. Middleton, Esq.) for the claimant W. E. Hedger Company, Inc., and Messrs. Burlingham, Veeder, Fearey, Clark & Hupper, (P. F. Shortridge, Esq.) for the claimant Long Island Railroad Company, and the deliberation having

been had, and the Court having rendered a decision in writing finding facts and stating conclusions of law and holding that petitioner herein is not entitled to limitation or exoneration of its liability.

Now, on motion of Single and Single, proctors for claimant, W. E. Hedger Company, Inc., it is

Ordered, adjudged, and decreed that petitioner, Cullen Fuel Company, is not entitled to exemption from liability [fol. 336] or to limitation of liability as claimed in its petition and said petition is hereby denied, and that the claimants herein have and recover of and from the petitioner, and its stipulators, their damages resulting from said capsizing of the scow Cullen No. 32 on August 13th, 1925, with interest and costs; and it is further

Ordered that the matter be referred to Horace M. Gray, Esquire, as Commissioner, to take such proofs as may be offered as to such damages of the claimants, and as to the amount of their claims filed herein and to report thereon to this Court with the evidence before him, with all convenient speed; and it is further

Ordered that all claimants who have filed claims herein do appear before the aforesaid Commissioner and make proof of their respective claims and that hearings before such Commissioner may be brought on by any party in interest by notice of four days; and it is further

Ordered that the injunction of this Court contained in the order of monition dated March 20, 1928, be and it hereby is continued in full force and effect and that the beginning or prosecution or determination of any and all claims, suits, actions or legal proceedings of any nature or description whatsoever except in the above entitled proceedings, in respect of any claim arising out of or resulting from the capsizing of the scow Cullen No. 32 on August 13th, 1925, be and they hereby are stayed and restrained until the entry of the final decree in this proceeding.

John W. Woolsey, U. S. District Judge.

[fol. 337] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL

Please take notice that the petitioner, Cullen Fuel Company, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the interlocutory decree, entered herein in the office of the Clerk of this Court on the 20th day of January, 1931.

Dated New York, N. Y., January 29, 1931.

Yours, etc., Macklin, Brown, Lenahan & Speer, Proctors for Petitioner. Office and P. O. address: 44 Beaver Street, Borough of Manhattan, City of New York.

To Single and Single, Esqs., 15 William Street, New York, N. Y.; Burlingham, Veeder, Fearey, Clark & Hupper, Esqs., 27 William Street, New York, N. Y.

[fol. 338] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR

Cullen Fuel Company, petitioner, hereby assigns error to the interlocutory decree of this Court entered on January 20, 1931, as follows:

1. The Court erred in entering the interlocutory decree of January 20, 1931.

2. The Court erred in decreeing that the Cullen Fuel Company, the petitioner, as owner of the scow "Cullen No. 32" was not entitled to limit its liability as to any claims filed herein.

3. The Court erred in decre-*asing* that the Cullen Fuel Company, the petitioner, was not entitled to exoneration from liability of the claims of the Long Island Railroad Company, W. E. Hedger Company, Inc., and any other claims filed herein.

4. The Court erred in failing to hold and decree that the Cullen Fuel Company was not liable in personam for the claims of the Long Island Railroad Company, W. E. Hedger Company, Inc., and any other claims filed herein.

[fols. 339-349] 5. The Court erred in finding and decreeing that the Cullen Fuel Company, the petitioner, was liable for the claims of the Long Island Railroad Company, W. E. Hedger Company, Inc., and any other claims filed herein.

Macklin, Brown, Lenahan & Speer, Proctors for Petitioner. Office and P. O. address: 44 Beaver Street, Borough of Manhattan, City of New York.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1932

Nos. 82, 83.

Argued November 17, 1932. Decided December 12, 1932

In the Matter of the Petition of the CULLEN FUEL COMPANY, INC., as Owner of The Deck Scow Cullen No. 32, for Limitation of Liability

Appeal from the District Court of the United States for the Southern District of New York

Before L. HAND, SWAN, and CHASE, Circuit Judges

Cullen Fuel Company, Inc., has appealed from an interlocutory decree denying it exoneration or limitation of liability, and from a final decree dismissing its libel against W. E. Hedger Company, Inc., and Port Fueling Corporation, Inc., impleaded respondent. The two causes were consolidated for the purpose of appeal. Interlocutory decree modified; final decree dismissing libel affirmed.

For opinion below, see 45 F. (2d) 859.

Macklin, Brown, Lenahan & Speer, of New York City (Horace L. Cheyney, of New York City, of counsel), for appellant.

Single & Single, of New York City (Thomas H. Middleton, of New York City, of counsel), for appellee W. E. Hedger Co., Inc.

Burlingham, Veeder, Fearey, Clark & Hupper, of New York City (P. Fearson Shortridge, of New York City, of counsel), for appellee Long Island R. Co.

Foley & Martin, of New York City (James A. Martin, of New York City, of counsel), for appellee Port Fueling Corporation.

SWAN, Circuit Judge:

In calm weather and while lying in a slip in the East River, the deck scow Cullen No. 32 careened and cast her load. In so doing the scow not only lost her cargo and damaged herself, but also did injury to Pier 22 and a carfloat belonging to Long Island Railroad Company. Liti-

gation resulted. Thereupon Cullen Fuel Company as owner of the scow filed a petition in the court below to limit its liability against the claims of Long Island Railroad Company for damage to its carfloat and pier, and the claim of W. E. Hedger Company, as bailee of the cargo. Cullen Fuel Company also filed a libel in personam against W. E. Hedger Company as demise charterer of the scow, for the damage to it. In the latter suit the charterer impleaded Port Fueling Corporation, the stevedoring corporation whose employees had loaded the scow with copper barytes discharged from a steamer berthed in the slip. The District Court found that the loading was properly done and the accident was caused by unseaworthiness of the scow. Accordingly the libel of Cullen Fuel Company and the petition impleading Port Fueling Corporation were dismissed. In the limitation proceeding limitation of liability was denied the petitioner and the cause was referred to a commissioner to take proof of the damages sustained by the two damage-claimants. From both decrees Cullen Fuel Company has appealed.

We accept the finding of fact that the scow was properly loaded. The testimony was in direct conflict on this point and the trial court's finding under such circumstances is not lightly to be upset. The court was not obliged to credit Rockenbeil's testimony that loading continued after he observed the scow's list. Indeed, his testimony is somewhat vague as to the time when he first observed it. Moreover, the argument is most persuasive that unless the scow leaked her list would not have increased as it did after the loading ceased. We think the finding is supported that the scow was leaking, or subject to leaks as the pressure of her load increased her draft, when the cargo was put on board. In other words, she was then unseaworthy. It does not necessarily follow that she was so when chartered to the Hedger Company, but that was only two days before and the scowman testified that nothing had happened to his scow during the intervening time. The owner has the burden of proving seaworthiness when the barge was delivered under her charter. Taylor Bros. Lumber Co. v. Sunset Lighterage Co., 43 F. (2d) 700 (C. C. A. 2). We agree with the District Court that the Cullen Company has not carried that burden. Hence its libel against the Hedger Company and the petition impleading Port Fueling Company were

rightly dismissed, for the damage to the scow was not proven to have been caused by any fault on the part of the charterer or the stevedores but was due to her own unseaworthiness.

Passing now to the limitation proceeding, the question arises whether the Hedger Company as bailee of the cargo can recover for its loss upon the Cullen Company's breach of warranty of seaworthiness. Pendleton v. Benner Line, 246 U. S. 353, 38 S. Ct. 330, 62 L. Ed. 770, so decided, where the libelant, the charterer, was liable for the shipper's loss and was suing for the cargo underwriter. The present case will be controlled by that authority provided the Hedger Company is shown to be liable to the cargo owner, Grasselli Chemical Company. While it does not definitely appear what were the relations between the Hedger Company and the Grasselli Company, it was proved that the former agreed to carry the cargo for the latter and prima facie this made it liable for the loss. Taylor Bros. Lumber Co. v. Sunset Lighterage Co., supra. The lighterage contract implies a warranty that the lighters to be furnished under it shall be seaworthy. The Loyal, 204 F. 930 (C. C. A. 2); The Jungshoved, 290 F. 733 (C. C. A. 2). If there were any express conditions in the contract which would excuse the Hedger Company as against the cargo owner, they do not appear. Hence the proof was sufficient that the charterer was liable for loss of cargo due to the scow's unseaworthiness. See The Harper No. 145, 42 F. (2d) 161 (C. C. A. 2); S. C. Loveland Co. v. Bethlehem Steel Co., 33 F. (2d) 655 (C. C. A. 3). This liability is a proper element of damage in its suit against the owner upon the latter's covenant. Pendleton v. Benner Line, supra.

There remains the question whether the Cullen Company may limit liability upon its covenant. The scow was chartered under the usual oral contract arranged by telephone. The covenant of seaworthiness is an implied covenant and the authorities are not in accord as to whether such an implied obligation is to be deemed the personal contract of the owner in such sense as to preclude limitation of liability under the doctrine declared in Pendleton v. Benner Line, 246 U. S. 353, 38 S. Ct. 330, 62 L. Ed. 770. In this circuit it has been given the same effect as an express contract. The Loyal, supra; see The Soerstad, 257 F. 130

(D. C. S. D. N. Y.); cf. The Ice King, 261 F. 897, 899 (C. C. A. 2). The opposite view was taken in Pocomoke Guano Co. v. Eastern Transp. Co., 285 F. 7 (C. C. A. 4). See, also, Quinlan v. Pew, 56 F. 111, 119 (C. C. A. 1). Capitol Transportation Co. v. Cambria Steel Co., 249 U. S. 334, 39 S. Ct. 292, 63 L. Ed. 631, actually dealt with an implied warranty, as appears from the district court's opinion (The Benjamin Noble [D. C.] 232 F. 382, 389), although the Supreme Court did not allude to this fact and apparently treated the case as governed by Pendleton v. Benner Line, supra, and Luckenbach v. W. J. McCahan Sugar Refining Co., 248 U. S. 139, 39 S. Ct. 53, 63 L. Ed. 170, 1 A. L. R. 1522, where the warranties were express. See comment on these cases in The No. 34, 25 F. (2d) 602, 607 (C. C. A. 2). We adhere to our own former ruling. In the court below limitation was denied upon the ground that the fault existed with the owner's privity or knowledge because no adequate examination of the scow was made before her delivery on charter. Since we follow The Loyal, the correctness of this ruling need not now be determined with respect to the Hedger Company's claim. Nor need it be decided with respect to the claim of Long Island Railroad Company for reasons which will hereafter appear.

Although to the charterer the owner warranted the seaworthiness of the scow, there was no such warranty to Long Island Railroad Company. Its claim sounds only in tort, and it has the burden of establishing that the damage to its pier and carfloat was caused by negligence, though aided by a presumption arising from the scow's colliding with its stationary property. The Buffalo, 56 F. (2d) 738 (C. C. A. 2). We are dealing with a collision, and the duty of the scow owner, breach of which imposes liability to the railroad company, is not the duty to have the scow seaworthy but merely the duty not to cause damage negligently. See The Kathryn B. Guinan, 176 F. 301 (C. C. A. 2); The Jamaica, 51 F. (2d) 858, 860 (D. C. W. D. N. Y.) To hold the owner liable for this collision damage it must appear that the owner was negligent in sending out the scow, since no negligence was shown in the management of her in the slip. In the case at bar the Cullen Company had no actual knowledge that she was in a leaky condition when sent out. The proof was that Sweet made a visual examination of her seams above the light water line, and went into her hold

with a flash-light to look for leaks below the water line. No leaks were discovered. The scowman testified that she had been deep in the water with a load of brick shortly before. It is true that the seams were not proved with a trier which is admitted to be the only sure method of testing them while the vessel is light, but we cannot think that such a test must be made before each charter under penalty of a finding of negligence as against the world in sending out the boat without it. Every inference points to the belief that the leaks appeared when the scow was submerged by her load; hence we put little weight on the failure of the Cullen Company to produce records of the dry dock repairs. On the whole, we think the Cullen Company put in enough to overcome the presumption of negligence arising from the collision. This left the burden of proof resting on the railroad company, and we cannot say it has been carried. Accordingly the scow and her owner must be exonerated against the tort claims of the Long Island Railroad Company. It relies upon this court's recent decision in The Buffalo, 56 F. (2d) 738. But that turned upon the point that the presumption of negligence arising from the fact of collision had not been rebutted. While the opinion does not disclose what evidence the owner presented in attempted rebuttal, the record shows that the examination of the barge before she went out was less than that made of the Cullen No. 32, and that the bargee could not be produced to testify as to her condition then or thereafter. In the present case, as already stated, the presumption was rebutted, and we cannot say that damage to other vessels was reasonably to have been foreseen in sending out the scow without a more thorough examination than that which was made; in other words, negligence was not proved. Cases such as Taylor Bros. Lumber Co. v. Sunset Lighterage Co., 43 F. (2d) 700 (C. C. A. 2), are to be distinguished because they relate to the duty owed to the carried cargo, not to other vessels.

Final decree affirmed, and interlocutory decree modified in accordance with the foregoing opinion.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court-

rooms, in the Post Office building, in the city of New York, on the 19th day of December, one thousand nine hundred and thirty-two.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Harrie B. Chase, Circuit Judges.

In the Matter of the Petition of THE CULLEN FUEL COMPANY, INC., as Owner of the Deck Scow "Cullen No. 32", for Limitation of Liability; CULLEN FUEL COMPANY, INC., Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be, and it hereby is, modified in accordance with the opinion of this court. Costs to the Cullen Fuel Company against the Long Island Company and to the Hedger Company against the Cullen Fuel Company.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. In re Cullen Fuel Company. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Dec. 19, 1932. William Parkin, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court-rooms in the Post Office building, in the city of New York, on the 19th day of December, one thousand nine hundred and thirty-two.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Harrie B. Chase, Circuit Judges.

CULLEN FUEL COMPANY, Libellant-Appellant,

vs.

W. E. HEDGER CO., INC., Port Fueling Company,
Respondent-Appellee

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be, and it hereby is, affirmed, with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. Cullen Fuel Company vs. W. E. Hedger Co., Inc. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Dec. 19, 1932. William Parkin, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

In the Matter of the Petition of THE CULLEN FUEL COMPANY, INC., as Owner of the Deckscow "Cullen #32", for Limitation of Liability

Filed Dec. 23, 1932

The Cullen Fuel Company, petitioner, hereby moves for reargument of the above cause, for the reasons hereinafter set forth.

In the opinion filed in this Court the right of the Cullen Fuel Company to limit liability was denied under the decision of this Court in The Loyal, 204 Fed. 930, namely, that there was a personal contract made by the petitioner and the Hedger Company under which there was an im-

plied warranty of the seaworthiness of the scow, and that the petitioner, having entered into a personal contract, could not limit liability for damage to the cargo.

This question is one of general interest in the carrying trade.

It was not argued in any of the briefs presented or at oral argument, and we therefore feel impelled to ask for a rehearing in which this question may be fully briefed and argued.

In the recent decision of the Supreme Court in the Galileo (not yet reported) reference is made to the fact that a large number of the bills of lading were not signed on behalf of the carrier, but that through bills of lading had been signed by railroad companies in the West.

The decision in the present case will bring about a most anomolous result. Suppose a steamship should depart from New York with some cargo covered by bills of lading issued by the railroads in the West and other cargo shipped at New York under which bills of lading issued by the company owning the steamship.

If a loss to the cargo should occur, under the present decision the owner could limit liability for loss of cargo covered by the through bills of lading signed by the railroad companies, but could not limit liability as against loss to cargo covered by the bills of lading signed by the owner in New York City.

Certainly such an anomolous result was not contemplated by Congress in enacting the Limiting Liability Law and that anomolous result indicates that there is some fallacy in the line of reasoning which would produce such a result.

Wherein does that fallacy lie? We think it can be found in the failure, in the various reported cases, to make a clear distinction between the provisions of the Acts of 1851 and 1884.

The pertinent provisions of the Act of 1851 are as follows (U. S. Code of Laws, Title 46, Chap. 8, Secs. 182 and 183):

"No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board

the vessel, unless such fire is caused by the design or neglect of such owner (R. S. Section 4282).

"The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending (R. S. Section 4283)."

The Act of 1884 reads as follows (U. S. Code of Laws, Title 46, Chap. 8, Sec. 189):

"The individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending; provided, That this provision shall not prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said shipowners (June 26, 1884, c. 121 Section 18, 23 Stat. 57)."

The petitioner in this case claims exemption from liability if any liability exists, under Section 4283 of the Revised Statutes.

The distinction between the two Statutes is quite clear. The Act of 1851 provides for limitation of liability only in certain specific instances.

Under Section 4282 the owner of any vessel was declared not liable for any loss or damage to cargo on board any such vessel by reason of fire, unless such fire is caused by the design or neglect of the owner.

Section 4283 of the Revised Statutes provides that the owner may only limit liability for damage to cargo on board his vessel, damage resulting from collision, etc., providing the damage occurs without his privity or knowledge.

The Act of 1884 is of an entirely different character, and provides that the individual liability of a shipowner shall be limited to the proportion of any or all debts and

liabilities that his individual share of the vessel bears to the whole.

It will be seen by an examination of all the authorities denying the right of an owner to limit liability on account of personal contracts, except possibly the Loyal, relate to claims for limitation of liability under the provisions of the Act of 1884 and not under the Act of 1851. Such confusion of thought as there may be has arisen from the fact that the cases arising under the Act of 1851 have been decided under the authority of cases relating to the Act of 1884. The provisions of the two Acts are so different that the authorities relating to limitation of liability under the Act of 1884 may have no application to the cases arising under the Act of 1851.

The propositions which we submit are that the authorities which hold that a shipowner, who claims to limit liability for debts or liabilities under the Act of 1884 cannot limit liability for losses arising out of a personal contract have no application to claims for limitation of liability for cargo losses under the Act of 1851; that the right to limit for cargo losses is governed solely by the provision of the Act of 1851; and under that act the question is not whether the owner has made a personal contract for the carriage of the goods but whether the loss to cargo has occurred without his privity or knowledge.

The Act of 1884 did not in any way amend or repeal the Act of 1851. It was merely supplementary to the Act of 1851 and extended the right to limit liability to a number of claims not included in the Act of 1851.

Such was the ruling of the Supreme Court in Richardson v. Harmon, 222 U. S. 96, where it was held that the Act of 1884 was in pari materia with the Act of 1851 and must be read in connection, with that act largely for administrative purposes, as the Act of 1884 did not carry the administrative provisions of the Act of 1851.

Pendleton v. Benner Line, 246 U. S. 353, is the usual starting point in the discussion of this question.

It will be seen by the opinion of Mr. Justice Holmes that the petitioner claimed limitation of liability only under the Act of 1884. No reference is made in the opinion to the Act of 1851. The Supreme Court held in that case that the Act of 1884 did not limit liability for the personal contracts of the vessel owner. It is said this proposition was

established by Richardson v. Harmon, 222 U. S. 96, but the remarks in the latter case were merely dicta as the question of personal contract was not involved.

In the Pendleton case, however the Court unquestionably declared that the Act of 1884 did not apply to cases where a personal contract existed.

The Decision of the Supreme Court in Pendleton v. Benner Line met wtih so much criticism both from the bench and bar that the Supreme Court was asked to review the question in Capitol Transportation Co. v. Cambria Steel Co., 249 U. S. 335, in which Mr. Justice Holmes said as follows:

"We very much appreciate the danger that the act should be cut down from its intended effect by too easy a finding of privity or knowledge on the part of owners, as also by too liberal an attribution to them of contracts as personally theirs. We are not disposed to press the law in those directions further than the cases go. But in this case, in addition to the finding of the owner's privity to the unseaworthiness, was the further finding that the contract was the personal contract of the petitioner—a finding that seems warranted if any contract by a corporation can fall within the class. That such contracts may impose a liability that cannot be transferred to what is left of the ship is decided. Luckenbach v. W. J. McCahan Sugar Refining Co., 248 U. S. 139, 149 (39 Sup. Ct. 53) (63 L. Ed. 170, 1 A. L. R. 1522)."

The decision in The Loyal, 204 Fed. 897 was rendered prior to that of the Pendleton case.

Later the question came up in The Ice King, 261 Fed. 897. That case did not involve a question of limitation for cargo loss. The question involved was the right to limit for negligence of a tugboat which was under a charter and in consequence of which an implied warranty of the seaworthiness of the tug arose. Judge Ward considered this question and after referring to the language in the Capitol Transportation Company v. Cambria Steel Company quoted above held that the law as to personal contracts did not apply to cases where there was only an implied warranty of seaworthiness and not an express warranty as there was in the Pendleton case.

It has been generally assumed by the bar that the decision of this Court in The Ice King overruled the case of The

Loyal, although no express statement to that effect is made in the opinion. That conclusion was one not only entertained by the bar but the Circuit Court of Appeals for the Fourth Circuit, in the Pocomoke Guano Co. v. Eastern Transp. Co., 285 Fed. 7, relying upon The Ice King, supra, as authority held that the rule as to personal contracts did not apply in a cargo case where the boat owner had entered into a personal contract of carriage under which there was an implied warranty of the seaworthiness of the boat.

The Court, in the present case, has gone back to the decision in The Loyal case and apparently has now overruled The Ice King case.

This Court was very much divided in the The Loyal case. Judge Noyes, who wrote the majority opinion, stated that the vessel owner is not entitled to limit his liability upon his personal contracts. In making this statement, great reliance was placed upon the decision of the Circuit Court of Appeals for the Sixth Circuit in Great Lakes Towing Co. v. Mills Transportation Co., 155 Fed. 11.

In the latter case, the contract was made by the owner of a stranded vessel for services in floating it. The efforts to float the vessel were unsuccessful.

That case was governed entirely by the Act of 1884. Under the Act of 1851, the owner of the stranded vessel who made the contract for floating it would not have been entitled to limit liability for the services rendered under that contract.

The language in the Great Lakes case from which Judge Noyes quoted, had application therefore only to the provisions of the Act of 1884 and did not in any way involve the construction of the Act of 1851 or any right of a ship owner to limit his liability under the contract under that act for damage to cargo.

In that case, the owner was not claiming to limit liability against cargo losses or other damage. It was claiming only to limit liability as to a debt, which it had personally contracted.

In The Loyal case, Judge Noyes stated as follows:

"We are unable to accept the contention that a vessel-owner, may be relieved from responsibility upon his personal contracts provided he does not break these himself.

The making of the contract is enough to place it outside of the statute."

Whether that statement is correct under the Act of 1884 is immaterial here, as we are concerned only with the construction and application of the Act of 1851.

The above quoted statement made by Judge Noyes is in direct conflict with the language of the Act of 1851 as that statute clearly makes the loss and not the contract the crucial point upon which the right of the owner to limit liability turns. The Act very clearly provides that the right to limit liability for loss of cargo depends upon the privity or knowledge of the owner of the loss and not of the contract for carriage.

This point was apparently overlooked in the opinion of Judge Noyes in The Loyal case and he erroneously relied upon a decision under the Act of 1884 which was not applicable to the question of the right to limit liability for loss of cargo without privity or knowledge of the owner under the Act of 1851.

There is another matter which has an important bearing upon this case, which is not referred to in the opinion of the Court.

The charter of the scow Cullen #32 was not made by any of the officers of the company. It was made by Sweet, who was a mere employee of the Cullen Transportation Company, the owner of the scow (fol. 168). It is true that that contract was binding upon the owner but nevertheless there was no personal contract of the owner entered into by any of its officers.

The question whether a vessel owner may limit his liability for cargo losses, if he has impliedly warranted the seaworthiness of the vessel is of much importance. The decision in The Loyal, supra, is in conflict with the decisions in other Circuits. It is desirable that the law upon a question of this character should be uniform.

It is impossible to forecast whether the Supreme Court will grant a certiorari for the purpose of having this question fully discussed and to bring about uniformity in the law.

It is to be inferred from reading Judge Lacombe's remarks in the case of The Loyal, supra, that it was his hope that the Supreme Court would grant a certiorari to get rid

of the conflict between the different circuits. An application was made to the Supreme Court for a certiorari and it was denied.

Under the limited liability law, it is possible for an owner who desires to limit liability to choose jurisdiction. For instance, in the case of loss of cargo by a vessel running between Boston and New York, it is possible for the owner to bring his suit in either jurisdiction. He, therefore, could commence a suit for limitation of liability in Boston, where he could limit liability, while he could not limit liability, under the decision of The Loyal case, if he should file his petition in New York.

In view of the importance of this question and also because it was not argued in this case, either in the briefs or orally, it is respectfully submitted that a rehearing should be granted.

Cullen Fuel Company, Petitioner, by Macklin, Brown, Lenahan & Speer, Proctors.

I, Horace L. Cheyney, counsel for the petitioner, do hereby certify that the above motion for rehearing is not made for the purpose of delay, and in my opinion, the motion for rehearing should be granted for the reasons set forth in the petition.

Horace L. Cheyney.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

In the Matter of Petition of THE CULLEN FUEL COMPANY, INC., as Owner of the Deck Scow "Cullen No. 32", for Limitation of Liability

On Petition for Rehearing

Before L. Hand, Swan, and Chase, Circuit Judges

Horace L. Cheyney Esq., for the petitioner.

Per CURIAM:

Petition denied.

——, Circuit Judges.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court-

rooms, in the Post Office building, in the city of New York, on the 10th day of January, one thousand nine hundred and thirty-three.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Harrie B. Chase, Circuit Judges.

In the Matter of Petition of THE CULLEN FUEL COMPANY, INC., as Owner of the Deck Scow "Cullen No. 32", for Limitation of Liability

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be, and hereby is, denied.

Wm. Parkin, Clerk.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. In re Cullen Fuel Company. Order. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 10, 1933. William Parkin, Clerk.

UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 368, inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the case of In the Matter of the Petition of The Cullen Fuel Company, Inc., as owner of the deck scow "Cullen No. 32", for limitation of liability; Cullen Fuel Company, Appellant (and another case), as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 26th day of January, in the year of our Lord one thousand nine hundred and thirty-three, and of the Independence of the said United States the one hundred and fifty-seventh.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 365] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 17, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 366] SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTING RECORD—Filed June 27, 1933

It is hereby stipulated that only the following portions of the record of the Circuit Court of Appeals for the Second Circuit now on file in this Court shall be printed for use on the argument herein and that no other portions of said record shall be printed:

	Pages
1. Statement	1
2. Petition of Cullen Fuel Company	2 to 10
3. Restraining Order	11 to 13
4. Answer of W. E. Hedger, Inc., and interrogatories	18 to 26
5. Answers to Interrogatories	27 to 29
6. Case	55 to 56
7. Testimony of Ernest D. Sweet	56 to 73
8. Testimony of Emanuel Santos	74 to 100
9. Testimony of Alphonse Avusso	100 to 111
9½. Testimony of Emanuel Santos	112 to 113
10. Testimony of Rudolph H. Sambraus	113 to 132
11. Testimony of Frank Gardner	132 to 166
11½. Testimony of Stanley W. Pierce	172 to 178
12. Opinion of Woolsey, J	318 to 331
13. Order	331 to 333
14. Interlocutory Decree	334 to 336

[fols. 367 & 368]

	Pages
15. Notice of Appeal	337
16. Assignments of Error	338 to 339
17. Opinion of Circuit Court of Appeals	350 to 354
18. Decree of Circuit Court of Appeals	354 to 355
19. Mandate of Circuit Court of Appeals	355 to 356
20. Motion for Rehearing	356 to 363
21. Order, Circuit Court of Appeals on Rehearing	363
22. Certificate	363 to 364
23. Copy of this stipulation, if necessary.	

Dated New York, N. Y., May —, 1933.

Horace L. Cheyney, Counsel for Cullen Fuel Company, Inc., Petitioner. Forrest E. Single, Counsel for W. E. Hedger, Inc. Chauncey I. Clark, Counsel for Long Island Railroad Co.

[fol. 369] [File endorsement omitted.]

Endorsed on cover: File No. 37,469. U. S. Circuit Court of Appeals, Second Circuit. Term No. 9. Cullen Fuel Company, Inc., owner of Deck Scow "Cullen No. 32," petitioner, vs. W. E. Hedger, Inc., bailee of cargo. Petition for a writ of certiorari and exhibit thereto. Filed March 14, 1933. File No. 9, O. T., 1933.